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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No......

STATE OF WASHINGTON, *Petitioner,*

vs.

INLAND EMPIRE REFINERIES, INC., A CORPORATION, *Respondent,*

MONTANA HEADLIGHT OIL COMPANY, A CORPORATION, AND GREAT NORTHERN RAILWAY COMPANY, A CORPORATION, *Interveners-Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF WASHINGTON

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

That petitioner (appellant in the Supreme Court of the State of Washington) appealed from the judgment

of the Superior Court for Thurston County, holding and declaring as unconstitutional and void the 1939 distributors petroleum products excise tax law (Chapter 186, Laws of Washington for 1939; *post* pp.....). The judgment of the Superior Court was affirmed by the State Supreme Court (Appendix A).

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

At its 1939 session, the Legislature of the State of Washington enacted a revenue measure known as Chapter 186, Laws of 1939, which imposed an excise tax on distributors of petroleum products, which tax amounted to one-quarter cent on each gallon of petroleum products withdrawn, sold, distributed or in any manner used by the distributor. The statute repealed Laws 1935, Chap. 180, Sec. 78-81, as amended by Laws 1937, Chap. 116, pp. 459-462, and constituted a new and complete taxing statute within itself.

The 1939 statute contained six exemptions in Section 15, of which the three following were considered in the state decision.[1]

On June 27, 1939, the Attorney General of the State of Washington, pursuant to the 1939 statute, instituted the present proceedings against Inland Empire Refineries,

---

[1] "Sec. 15. The dsitributor shall be exempt from the tax herein imposed upon the following; * * *

"(d) Withdrawal, sale or distribution of petroleum products by a distributor to any vessel engaged in foreign commerce.

"(e) Withdrawal, sale or distribution by a distributor of all petroleum products derived from the refining within this state of crude petroleum or crude oil.

"(f) Withdrawal, sale or distribution of petroleum products by a distributor to any person who is subject to tax under title V, chapter 180, Laws of 1935, and amendments thereto, and who purchases such petroleum products for the purpose of converting and who does actually convert the same into manufactured gas for distribution to the public."

Inc., to collect a tax of $430.39 assessed upon 172,117 gallons of fuel oil refined within the state, and sold and distributed by the defendant. The tax was resisted on ground that defendant was within the exemption provided by Section 15, Sub. Div. (e); and the Attorney General contended that the statute continued in full force and effect by virtue of an extensive severability clause contained in Section 21.[2]

Before the case went to trial, the Great Northern Railway Company and the Montana Headlight Oil Company intervened by petition. Whereas the defendant Inland Empire Refineries, Inc., took the position that the statute was constitutional in its entirety, the Great Northern Railway Company assumed the burden of a direct attack on the statute, claiming that the enactment violated the privileges and immunities clause of Art. I, Sec. 12 of the State Constitution, the commerce clause of Art. I, Sec. 8, Clause 3 of the Federal constitution, and the equal protection clause of the 14th amendment to the constitution of the United States. On the 9th day of September, 1939, without changing the issues, the case of *State v. Inland Empire Refineries, Inc.*, was consolidated by stipulation for the purposes of trial with the case of *Great Northern Ry. Co. v. Dave S. Cohn* and *Tide Water Associated Oil Company*, for a declaratory judgment.

The superior court of the State of Washington held the statute unconstitutional in its entirety, rendering the following memorandum opinion: "For the reasons as-

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[2] "Sec. 21. If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

signed and argued, the Court finds that the act in question; that is, the fuel oil act, is unconstitutional and void. Judgment may be taken accordingly."

The Supreme Court of the State of Washington affirmed the judgment on the grounds that the statute unreasonably discriminated between users of petroleum products and users of hard fuels; that conditions in the statute imposed burdens on intertate commerce; and that exemptions in Subdivisions (d), (e) and (f) were unreasonably discriminatory. The opinion reported as the *State of Washington v. Inland Empire Refineries, Inc. et al.*, 103 Wash. Dec. 573, 101 P. (2d) 975, is appended hereto, and analyzed hereinafter.

II

I: The jurisdiction of the Supreme Court of the United States to review this case is sustained by virtue of the statutory authorization contained in 38 U. S. C. A. 344 (b).

II: The state statute under consideration is Chapter 186 of Laws of 1939; the pertinent provisions of which may be summarized as follows:

Section 1 levies upon every distributor an excise tax of ¼ cent for each gallon of refined or partially refined liquid or liquefiable petroleum products withdrawn, sold, distributed or in any manner used by the distributor in the State of Washington except as exempted by Section 15.

Section 2 (a) defines a distributor as any person or company who: refines, manufactures or compounds petroleum products and withdraws, sells, or uses the same

within the state; or acquires the same within the state from one refining it within or importing it into the state and upon which the ¼ cent tax has not been paid; or imports the petroleum products into the state and withdraws, sells, distributes or used the same within the state.

Section 3 requires every distributor to make application for a license, to post a bond, and to pay a filing fee of $10.00.

Section 4 provides for the issuance of a license, license card and license certificate, and also provides for a hearing in case the Director of Licenses cancels a license or refuses to grant a license.

By Section 6, each distributor is required to file, on or before the 15th day of each month a sworn statement showing the number of gallons he has withdrawn, sold, distributed or used during the preceding month, and upon his failure to so do, the Director of Licenses is authorized to determine the amount, to assess the tax, and to add a 10% penalty.

By Section 7 each distributor is penalized 10% upon failure to make payment upon the day set. This section also provides for the assessment of the tax upon all persons acting as distributors without licenses and the imposition upon them of a 100% penalty.

Section 8 impresses all property of delinquent distributors with a lien in favor of the state.

Section 15 makes provision for six exemptions to the distributor. The first three relate to interstate and foreign commerce, exports and distribution to the United States. The latter three have received previous mention.

Section 16 imposes penalties for failure to pay tax, and for violation of any provisions of the act.

Section 21 contains an extensive severability clause.

III: The final judgment was entered by the Supreme Court of the State of Washington on July 3, 1940.

Respondent respectfully submits that this court has jurisdiction to review a decision of a state court when the state decision has been placed on both state and federal grounds which are so interwoven and intertwined that a non federal ground upon which the opinion could be sustained cannot be isolated; and has jurisdiction to review a decision of the state court where reliance was placed on both state and federal grounds, to determine if there were fair and substantial evidence upon which the state ground could be sustained.

Petitioner respectfully submits that for the following reasons set forth herein and developed more fully in the appended brief, the United States Supreme Court, under the above principles, has jurisdiction to review this case on writ of certiorari.

A: The state court invalidated that portion of the statute which imposed a tax on distributors of petroleum products, without imposing a corresponding tax on distributors of hard fuels, on the sole authority of the 14th amendment to the federal constitution.

Although both the 14th amendment to the federal constitution and the privileges and immunities clause of Art. I, Sec. 12 of the state constitution were mentioned by the state court, the statute was not violative of the state constitution and therefore was invalidated by virtue of its repugnance to the federal constitution. The

state privileges and immunities clause, by express terms, prevents the granting of privileges or immunities to any citizen or class of citizens which shall not upon the same terms belong to all citizens, but does not by its terms prevent the imposition of burdens on one citizen or class of citizens which have not been imposed on all citizens, whereas the federal equal protection clause is not limited in operation to statutes granting privileges or immunities, but extends alike to all laws which do not operate equally, and thereby guarantees equal protection of laws. The tax is a burden—and as a burden must be equally imposed to satisfy the 14th amendment to the federal constitution. The tax is not a privilege or immunity within the scope of the state clause, and therefore cannot be rendered invalid by the operation of the state privilege and immunity clause. Reference to the state clause was made for the purpose of recognizing that the state court will permit a reasonable classification in excise tax legislation.

B: In the alternative petitioner respectfully submits that there was an insufficiency of fair and substantial evidence upon which the state court could predicate a finding either that the tax unreasonably discriminates against petroleum products, or that there was not a reasonable basis upon which a distinction between distributors of petroleum products and distributors of hard fuels could be drawn. This position is emphasized by the fact that the state court inadvertently referred to the tax, and investigated the record before it, as if the tax were a pass on tax or a tax on the consumer. Evidence to support discrimination as to the consumer does not by that token support the same result when the

tax is viewed in the light of its true impact on the distributor, for the excise is levied on the distributor, not on the consumer.

C: The state court determined that the conditions imposed by the statute upon the distributors of petroleum products constituted an unlawful burden on interstate commerce. The regulation and control of interstate commerce are federal questions the ultimate determination of which are within the sole jurisdiction of the Supreme Court of the United States.

D. Petitioner respectfully submits that there is not fair and substantial evidence upon which the decision invalidating the exemption contained in Sec. 15, Subdivisions (d) and (f), can be grounded.

The state court held that the exemption contained in Sec. 15, subdiv. (d) exempting the distributor from the tax upon withdrawal, sale or distribution of petroleum products to any vessel engaged in foreign commerce, unreasonably discriminated against railroads and other transportation agencies similarly engaged in foreign commerce. The tax was not levied on vessels or on other transportation agencies engaged in foreign commerce, but on the distributors of petroleum products, and the exemptions were extended to the distributors only. Evidence pointing to discrimination between consumers does not establish discrimination between distributors.

All distributors were treated alike, each was exempted from tax on distribution of petroleum products to vessels engaged in foreign commerce, consequently there could be no substantial ground upon which to base

a finding that there was a discrimination as to distributors, the class upon whom the tax was levied.

The state court declared that subdivision (f), Sec. 15, "under which the Seattle Gas Company is exempted from the fuel oil tax," unreasonably discriminated against other public utility companies using oil for the purpose of supplying service to the public. However, the exemption extended not to the Seattle Gas Company, but to distributors withdrawing, selling, or distributing to any person using fuel oil to manufacture gas for sale to the public, and paying the public utility tax, consequently there was a lack of fair and substantial evidence upon which to base a finding that there was unreasonable discrimination between distributors, who actually were alone liable for the tax, and who were not considered in the discussion of the exemption.

All distributors were accorded the same exemption on oil sold, withdrawn, and distributed to gas companies, and all distributors were taxed alike. To conclude that the distributors were classified would be entirely unwarranted by fair and substantial evidence.

E. Devoid of federal grounds, the only non-federal basis upon which the decision can be upheld is that the exemptions of Subdivisions (d), (e) and (f) are invalid, and that the remainder of the statute is broadened in operation by the inclusion within the scope of the statute, of the three classes that were intended by the legislature to be exempt from the tax. Petitioner respectfully submits, that for the following reasons, this conclusion is so unwarranted and unsubstantiated as to be a mere pretense.

With Respect to Exemption (d)

Notwithstanding the invalidation of Subdivision (d), the state, by virtue of Subdivision (a), Sec. 15, is powerless to exact a tax on distributors for transactions had with vessels engaged in foreign commerce, therefore the invalidation of Subdivision (d) will not have the effect of permitting a tax on foreign commerce by vessel, or of broadening the operation of the taxing statute.

The body of the tax enactment did not levy a tax on vessels engaged in foreign commerce, so the invalidation of the exemption would not subject vessels to the tax.

If, however, the tax be construed as a tax on the vessels engaged in foreign commerce, the commerce clause of the federal constitution would prevent the exaction of the excise, and the statute could not be broadened in operation.

The tax was levied on distributors, and the invalidation of the exemption would not bring an additional class within the operation of the statute, but would merely increase the tax burden of the distributor.

With Respect to Exemption (f)

The tax on the face of the statute is levied solely on the distributor, therefore the invalidation of the exemption would merely impose a greater burden on the distributor and would not operate to permit the levy of a tax on the gas companies mentioned in the exemption.

WITH RESPECT TO EXEMPTION (E)

The tax on the face of the statute is levied solely on the *distributor,* likewise, the invalidation of the exemption would merely impose a greater burden on the distributor, and would not subject refiners as such within the state to the tax.

Thus the non-federal ground relied on by the state court is that the revenue act, if broadened in operation by including within its scope, the three subjects intended by the legislature to be exempt, will be unconstitutional.

However, if it be found either that the invalidation of one or more of the exemptions was improper, or that the invalidation of one or more of the exemptions will not have the effect of broadening the enactment to the extent of that or those exemptions, then the non-federal ground will be without substance; for the state decision did not declare that the remainder of the statute would be unconstitutional if broadened in operation to a degree less than that resulting from the validation of all three exemptions.

III

CASES SUSTAINING JURISDICTION OF THIS COURT

Supreme court can review a decision of the state court to determine if the non-federal basis of the decision was supported by fair and substantial grounds.

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419;

Broad River Co. v. So. Carolina, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401.

Supreme court can review a decision of the state court when the state ground is so interwoven with the Federal ground, as not to be an independent matter.

Abie State Bank v. Bryan, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

Supreme court can review a decision of the state court to determine if there was fair and substantial evidence upon which to base the state decision.

Union Pacific Ry. Co. v. Public Service Commission, 248 U. S. 67, 63 L. Ed. 131, 39 S. Ct. 24;

Creswell v. Knights of Pythias, 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 822.

IV

SUBSTANTIAL FEDERAL QUESTION

Petitioner respectfully contends that the decision of the State Supreme Court presents substantial federal questions for the following reasons:

The 14th amendment to the federal constitution was invoked to render unconstitutional that part of the statute imposing a tax on distributors of petroleum products without imposing a corresponding tax on distributors of hard fuels.

No previous case has applied the 14th amendment to the federal constitution for the purpose of striking down a state statute classifying distributors for the purpose of an excise enactment, into distributors of hard fuels, and distributors of petroleum products.

The federal courts have uniformly expressed a willingness to permit reasonable classifications under the 14th amendment to the federal constitution, for the purpose of state excise enactments.

The commerce clause, Art. I, Sec. 8, Clause 3, of the Federal constitution was invoked to invalidate the statute on the ground that unconstitutional burdens were imposed on interstate commerce.

No case has been found holding that nondiscriminatory licenses and bond requirements, and license fees imposed an unconstitutional burden on interstate commerce in violation of the commerce clause of the Federal constitution.

Numerous cases dealing with the federal commerce clause have sustained state nondiscriminatory statutes imposing license fees and license requirements, even though those conditions might incidentally have impact on companies engaged in both interstate and intrastate commerce.

The state court invoked both the 14th amendment to the federal constitution, and the commerce clause of the federal constitution, for the purpose of invalidating the state statute, thus rendering the federal questions substantial in so far as the state decision is concerned.

V

Federal questions were raised in the Superior Court of Thurston County, Washington, in the following manner:

I: Interstate commerce question under Art. I, Sec. 8, Clause 3.

The Great Northern Railway Company, in its Amended Complaint in Intervention in paragraphs XV and XVIII, alleged that the statute imposed an unconstitutional burden on interstate commerce.

The answer of the State of Washington to the Amended Complaint in Intervention of the Great Northern Railway Company, denied paragraphs XV and XVIII.

The Superior Court of Thurston County, found in Conclusions of Law, paragraphs I, III and VIII, that an unconstitutional burden was placed on interstate commerce ;and in the Judgment and Decree, paragraph I, found the same.

II: Discrimination and classification question under the 14th amendment to the Federal Constitution.

The Great Northern Railway Company, in its Amended Complaint in Intervention in paragraphs XIV, XVI and XVIII, alleged that the classifications in the statute violated the fourteenth amendment to the Federal Constitution.

The answer of the State of Washington to the Amended Complaint in Intervention of the Great Northern Railway Company, denied paragraphs XIV, XVI and XVIII.

The Superior Court of Thurston County, found in Conclusions of Law, paragraphs I, III and X, that the classification violated the fourteenth amendment to the Federal Constitution, and in the Judgment and Decree, paragraph I, found the same.

Federal questions were raised on appeal to the Supreme Court of the State of Washington, and disposed of in the following manner:

I: Interstate commerce question under Art. I, Sec. 8, Clause 3.

In Appellants opening brief, in assignments of error I and III.

In appellants Petition for Rehearing or Modifiication at page 41.

In Answer of Interventor-Respondent Great Northern Railway Company to the Petition for Rehearing or Modification at page 22.

In the Opinion and Decision of the Supreme Court of the State of Washington, wherein it was stated that an unconstitutional burden was placed upon interstate commerce in contravention of Art. I, Sec. 8, Clause 3.

II: Discrimination and classification question under the 14th amendment to the Federal Constitution.

In Appellants opening brief, in assignments of error I and III.

In Intervenor-Respondent Great Northern Railway Company's Answering Brief at page 11.

In Appellants petition for rehearing or Modification at page 13.

In Answer of Intervenor-Respondent Great Northern Railway Company to the Petition for Rehearing or Modification, at page 9.

In the Opinion and Decision of the Supreme Court of the State of Washington, wherein it was stated that the classification of the statute was unconstitutional in contravention of the fourteenth amendment to the Federal Constitution.

VI

FEDERAL QUESTIONS

I: Does Chap. 186 of the Laws of 1939 impose unconstitutional burdens on interstate commerce in contravention of Art. I, Sec. 8, Clause 3 of the Federal Constitution?

II: Does Chap. 186 of the Laws of 1939 deny to the distributors of petroleum products the equal protection of laws in contravention of the fourteenth amendment to the Federal Constitution, by imposing a tax on distributors of petroleum products, without imposing a like tax on distributors of hard fuels?

VII

REASONS FOR ALLOWANCE OF THE WRIT

Rule 38, Sec. 5 (a) of the Supreme Court rules provides that this court may exercise discretion to grant a writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Petitioner contends that the state court has decided the federal questions differently than they have heretofore been decided by this court.

Chapter 186 of the Laws of 1939 is of vital importance to the State of Washington. The state will be compelled to immediately refund approximately $2,500,000, and will lose an annual revenue of approximately $3,000,000, by the invalidation of the statute.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the supreme court of the state of Washington, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said supreme court had in the case numbered and entitled on its docket No. 27852 State of Washington, appellant, v. Inland Empire Refineries, Inc., respondent, Montana Headlight Oil Company, a corporation, and Great Northern Railway Company, a corporation, Intervener-Respondents, to the end that this cause may be reviewed by this court as provided by the statutes of the United States; and that the judgment herein of said state supreme court be reversed by this court and for such other and further relief as to this court may seem proper and just.

Dated September 23, 1940.

SMITH TROY,
Attorney General of the State of Washington,

JOHN E. BELCHER,
Assistant Attorney General of the State of Washington.

Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No......

STATE OF WASHINGTON, *Petitioner*
(Appellant below)

vs.

INLAND EMPIRE REFINERIES, INC., *Respondent*
(Respondent below)

MONTANA HEADLIGHT OIL COMPANY, A CORPORATION, AND GREAT NORTHERN RY. CO., A CORPORATION, *Interveners*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I:

OPINION OF COURT BELOW

The majority and dissenting opinions of the Supreme Court of the State of Washington (Appendix) are reported in 103 Wash. Dec. 573, 101 P. (2d) 975 (1940). The case has not yet been officially reported.

II:

JURISDICTION

The jurisdiction statement in the petition (*ante* p. 4) contains a summary statement of the petitioners position

in regard to the jurisdiction of this court. Petitioner, however, requests the indulgence of the court in order that he may further expand the jurisdictional grounds, and a close analysis of the decision is necessary in order to establish that this court has jurisdiction by virtue of the fact that there are actually no substantial state grounds upon which the decision may be supported.

THE CLASSIFICATION BETWEEN DISTRIBUTORS OF PETROLEUM PRODUCTS AND DISTRIBUTORS OF HARD FUELS WAS DECLARED UNCONSTITUTIONAL BECAUSE VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In the first portion of the opinion (Appendix A) reference is made to both the Federal and State constitutions. This was for the purpose of indicating that the Supreme Court is willing to permit classification in excise taxation, if such classification be not arbitrary or capricious. The office of rendering the classification unconstitutional was confined to the federal constitutional clause, which alone was applicable to that portion of the Washington statute imposing burdens on the distributor of petroleum products. It cannot be overlooked that the 14th amendment to the federal constitution is worded differently than the privileges and immunities clause of Art. I, Sec. 12, of the state constitution, and therefore has a different operative effect. The respective provisions are as follows

Fourteenth amendment to the federal constitution: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Art. I, Sec. 12, of the state constitution: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

As was indicated in the jurisdictional statement (*ante* pp. 6-7) the 14th amendment to the federal constitution is a general provision extending alike to statutes granting privileges or imposing burdens, whereas the state constitution only operates to prevent the granting of privileges and does not prevent the imposition of burdens. A taxing statute of the nature here involved, imposes burdens, and does not grant privileges, therefore is within the scope of the federal constitution, not the state constitution. Washington cases dealing with the two constitutions have been concerned with the problem of classification (in which both constitutions have the same operative effect) and not with the problem of the basic and fundamental operative scopes of the statute.

Petitioner respectfully cites to this court the following cases from Washington, Oregon, California, and Indiana which recognize that a statute which expressly prohibits the unequal granting of privileges is not broad enough to prohibit the unequal imposition of burdens.

In *State v. Vance,* 29 Wash. 435, 458, 70 Pac. 34, defendant attacked a statute on grounds that it violated the privileges and immunities clause of the state constitution. In disposing of this contention the court said:

"No privilege or immunity, within the meaning of the constitution, has been granted to them under the

act under consideration. The performance of a duty only has been imposed on them as officers of the court. Just as if the legislature had imposed the duty of nominating such commissioners upon the clerk of the court and the sheriff. * * * "

A similar attack was made in *In re O'Neil*, 41 Wash. 174, 185, 83 Pac. 104, where it was alleged that an act imposing regulations upon the ticket brokerage business violated the privileges and immunities of the state constitution. The supreme court again reached the same conclusion:

"It is further argued that the act is objectionable in that it denies to the appellant the equal protection of the laws. It is claimed that it grants special privileges to railroad companies which are not enjoyed by other citizens. *Cases we have cited hold that such a law does not grant special privileges, but that it rather imposes a burden upon railway companies,* in that it limits the authority to sell tickets to the agent of the carrier appointing him, requires that the railroad company shall provide him with a certificate of authority, that no others shall sell transportation, and compels the company to redeem unused tickets. In view of all the requirements placed upon the railroad companies, we do not think it should be said that the act confers special privileges within constitutional prohibition. It, in effect says to railroad companies, You must duly commission all persons who sell your transportation; no others shall purchase it, and you shall redeem all unused transportation." (Italics ours.)

The following cases are authority for the proposition:

Ex parte Gerino, 143 Cal. 412, 414-416, 77 Pac. 166;
Fry v. State, 63 Ind. 552, 560, 30 Am. Rep. 238;
Ferner v. State, 151 Ind. 247, 249-250, 51 N. E. 360;
State ex rel. Gibson v. Richardson, 48 Ore. 309, 316, 85 Pac. 225.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT THE STATUTE UNREASONABLY DISCRIMINATED BETWEEN DISTRIBUTORS OF PETROLEUM PRODUCTS AND DISTRIBUTORS OF HARD FUELS, OR THAT THE CLASSIFICATION OF DISTRIBUTORS INTO THE TWO GROUPS IS UNREASONABLE.

The state court found that the tax upon the "user" of petroleum products, and not on the users of other fuel, constituted an arbitrary classification. The court inadvertently considered the tax as a consumers tax, or a users tax, consequently that portion of the opinion in which the tax is so treated should be disregarded as not furnishing a substantial ground upon which to invalidate the tax as a distributors tax. This position is emphatically proclaimed by the Washington Supreme Court itself, for on the same day the instant case was decided, the court, in the case of *Great Northern Railway Company v. Cohn,* 103 Wash. Dec. 591, 101 P. (2d) 985, (appendix B) directly held that the 1939 statute was not applicable to the Great Northern Railway Company because the Company used or consumed the fuel oil, and was not engaged in the business of distributing petroleum products. That the tax was levied on the distributor and not on the consumer was also established by the case of *State v. Fidelity & Deposit Co. of Maryland,* 194 Wash. 591, 78 P. (2d) 1090, which dealt with an earlier but similar statute.

It is clear that there cannot be a discrimination against the users of petroleum products for the reason that no tax is levied upon the users. While the users of the fuel oil may have to bear the ultimate financial

burden of the tax just as the consumers must bear the burden of nearly all taxes in the form of increased prices, the discrimination against which the equal protection clause operates is not of this nature. The equal protection clause is concerned with the direct incidence of the tax as imposed by the statute. The Supreme Court of the United States has adopted the view, with which the Supreme Court of the State of Washington has not expressly differed, that an excise tax of the type here involved cannot as a tax, be passed on.

Lash's Products Co. v. United States, 278 U. S. 175, 73 L. Ed. 251, 49 S. Ct. 98.

See also,

Shearer v. Commissioner of Internal Revenue, 48 F. (2d) 552 (C. C. A. 2d, 1931).

The jurisdiction of this court to review a state decision ignoring the true operation of the state statute under consideration was established in *St. Louis Southwestern Railway Company v. Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 35 S. Ct. 99, where it was held:

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." (Citation of authorities.)

See also:

Home Insurance Company v. New York, 134 U. S. 594, 33 L. Ed. 1025, 10 S. Ct. 593;

Anderson v. Forty-Two Broadway Company, 239 U. S. 69, 60 L. Ed. 152, 36 S. Ct. 17;

Texas Co. v. Brown, 258 U. S. 466, 66 L. Ed. 721, 42 S. Ct. 375;

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297, 43 S. Ct. 125;

Educational Films Corporation v. Ward, 282 U. S. 379, 75 L. Ed. 400, 51 S. Ct. 170.

THE PRESENCE OF COMPETITION ALONE CANNOT BE SUFFICIENT TO RENDER A CLASSIFICATION OTHERWISE VALID, UNREASONABLE AND VOID.

This court has clearly established that for the purposes of the equal protection clause, competition alone is insufficient to require that all competitions be included in the same classification for excise tax legislation.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, 43 S. Ct. 83;

Lawrence v. State Tax Commission of Miss., 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556;

Union Bank & Trust Company v. Phelps, 288 U. S. 181, 77 L. Ed. 687, 53 S. Ct. 321.

Washington Supreme Court has never considered the presence of competition alone as decisive.

McNight v. Hodge, 55 Wash. 289, 104 Pac. 504;

Allen v. Bellingham, 95 Wash. 12, 163 Fed. 18;

Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837;

Garretson Co. v. Robinson, 178 Wash. 601, 35 P. (2d) 504.

III:

STATEMENT OF THE CASE

A summary of the matter involved has been set forth in the accompanying petition (*ante* p. 2).

IV:

SPECIFICATION OF ERRORS

I: Respondent respectfully submits that the Supreme Court of the State of Washington erred in holding that Laws of 1939, Chap. 186, violated the equal protection clause of the fourteenth amendment to the Federal Constitution.

II: Respondent respectfully submits that the Supreme Court of the State of Washington erred in holding that Laws of 1939, Chap. 186, violated the commerce clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

III: Respondent respectfully submits that the Supreme Court of the State of Washington erred in affirming the judgment of the Superior Court in favor of the defendant and the interveners and in holding Laws 1939, Chap. 186, unconstitutional in its entirety.

V:

ARGUMENT

The brief, which has been mainly devoted to the jurisdiction problem, will be direct and concise on the merits.

I

THE IMPOSITION OF AN EXCISE TAX UPON THE DISTRIBUTOR OF PETROLEUM PRODUCTS DOES NOT ARBITRARILY DISCRIMINATE AGAINST THEM IN FAVOR OF DISTRIBUTORS OF OTHER FUELS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The one proposition that can be derived from the numerous cases dealing with classification in tax legisla-

tion, is that the courts are willing to permit classifications that are reasonable, and to this end sanction wide latitude in the classification. The leading case sustaining this proposition is *Bell's Gap Railroad Company v. Pennsyvania*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533, wherein the court stated that:

"The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which

every State in one form or another, deems it expedient to adopt."

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, the State of New Mexico levied a sales tax of two cents a gallon on distributors of gasoline. In the face of an attack on constitutional grounds the court found "no reason to doubt the power of the State to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use; * * * "

Similar to the instant case, was the case of *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 S. Ct. 93, where a property tax was levied on anthracite coal and not on bituminous coal. In sustaining the classification, the court said:

"The fact of competition may be accepted. Both coals, being compositions of carbon, are of course capable of combustion and may be used as fuels, but under different conditions and manifestations; and the difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The difference between them are a just basis for their different classifications; * * * "

Other cases supporting classifications under circumstances wherein the difference in the classes are less marked than in the instant case include:

Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310;

A. Magnano Co. v. Hamilton, 292 U. S. 40, 78 L. Ed. 1109, 54 S. Ct. 599.

Cases dealing with reasonable classifications of course are legion, and the citation of a great number of them here would serve no purpose other than to illustrate that the courts are lenient, and will in each case search for differences in the class in order that a classification can be sustained as reasonable. Petitioner advances that there is a difference between petroleum products on the one hand, and hard fuels, such as coke, coal, sawdust, and hog fuel on the other, and that a classification based on those differences satisfies every test of a reasonable classification, and that it cannot be said that the classfication is unreasonable, arbitrary, or capricious in violation of the 14th amendment to the Federal constitution.

II

THE TAX IS NOT A BURDEN ON INTERSTATE COMMERCE.

The rule is well established that an activity such as here taxed by the state, after the subject of the tax has come to rest within the State there is no violation of the commerce clause.

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388;

Sonneborn Bros. v. Curston, 262 U. S. 506, 43 S. Ct. 643;

Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606;

Vancouver Oil Co. v. Henneford, 183 Wash. 317.

We appreciate the principle that a state cannot exercise a power to tax the products of other states introduced into it, so as to discriminate against the products of other states, and in favor of its own products.

Welton v. Missouri, 91 U. S. 275;

Wood v Maryland, 12 Wall. 418;
Hinson v. Scott, 8 Wall. 148;
Woodruff v. Purham, 8 Wall, 123;
Darnell & Son v. Memphis, 208 U. S. 113;
Baldwin v. Seelig, 294 U. S. 511.

We also realize we cannot here seek a review of the State Court's construction of a local law. But we do insist, however, that if the act contains an invalid exemption, that exemption should be eliminated and the remainder of the act allowed to stand. This is particularly true in view of the severability clause contained in the act. (Section 21.)

The case of *Utah Power & Light Company v. Pfost*, 286 U. S. 165, involved the validity of a state statute imposing a privilege tax on the generation and transmission of electrical energy, but containing a provision exempting electricity used for pumping irrigation water, which exemption, it was claimed, rendered the whole act void as discriminatory.

This court held, however, in view of the presence there, as here, of a severability clause, that if the exemption resulted in unlawful discrimination, the exemption clause could be eliminated and the remainder of the act could stand.

For the reasons urged we respectfully pray that the petition for a writ of certiorari be granted.

SMITH TROY,
Attorney General of the State of Washington,

JOHN E. BELCHER,
Assistant Attorney General of the State of Washington.

For Petitioner.

APPENDIX A

[No. 27852. *En Banc*. April 26, 1940.]

THE STATE OF WASHINGTON, *Appellant*, v. INLAND EMPIRE REFINERIES, INC., *et al.*, *Respondents*.[1]

[1] Constitutional Law—Privileges and Immunities—Equal Protection of Laws—Excise Taxes—Reasonableness of Classification.

[2] Same—Licenses—Taxation—Excise Taxes—Fuel Oil—Reasonableness of Classification as to Distributors of Other Fuels.

[3] Same—Fuel Oil — Discrimination — Exemption of Vessels From

[4] Same—Excise Tax on Fuel Oil—Exemptions — Discrimination—Local Refineries.

[5] Same—Excise Tax on Fuel Oil—Exemptions—Discrimination—Manufacturers of Gas.

[6] Commerce—Excise Tax on Fuel Oil—As Burden on Interstate Commerce.

[7] Statutes—Validity—Effect of Partial Invalidity.

[8] Parties—New Parties—Intervention—Parties Entitled to Intervene—Interest in Subject Matter.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 27, 1939, upon findings in favor of the defendant and interveners, in an action to collect a tax, tried to the court. Affirmed.

The Attorney General, John E. Belcher and *L. C. Brodbeck, Assistants*, for appellant.

R. E. Lowe, for respondent Inland Empire Refineries, Inc.

Thomas Balmer, Edwin C. Matthias, and *Anthony Kane*, for respondent Great Northern Railway Company.

Poe, Falknor, Emory & Howe, Wallace G. Mills, Harold P. Troy, and *E. W. Anderson, amici curiae*.

MILLARD, J.—This action was instituted by the state, under the provisions of chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21] *et seq.* (which imposes, in addition to any other tax provided by law, an excise tax upon each distributor at the

ate of one-fourth of one cent for each gallon of petroleum products withdrawn, sold, distributed, or in any manner used by such distributor within this state, except as expressly exempted by § 15 of chapter 186, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35]), to collect from the Inland Empire Refineries, Inc., a domestic corporation, taxes alleged to be due on the distribution of fuel oil by that corporation.

There is no dispute as to the amount of the tax. The purpose of the action is to test the validity of the exemption embodied in subd. (e), § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (e). It is the state's position that that subdivision is invalid and must be discarded, with the result that distributors of locally refined fuel oil would become subject to the tax.

Montana Headlight Oil Company, a corporation which is in all respects situated precisely as the Inland Empire Refineries, Inc., intervened. The Great Northern Railway Company also filed a complaint in intervention because of a certain contract with the Inland Empire Refineries, Inc., under which the latter supplies the railway company with a portion of its fuel oil within this state.

This action was consolidated for purposes of trial with the action of the *Great Northern R. Co. v. Cohn, post* p. 591, — P. (2d) —, for a declaratory judgment. In the action instituted by the railway company and in *Weyerhaeuser Timber Co. v. Cohn, post* p. 612, — P. (2d) — (which was brought to obtain a judgment declaratory of the rights of the timber company under the fuel oil tax statute (chapter 186, Laws of 1939), with respect to the exaction of a tax on fuel oil purchased by the timber com-

pany from two oil companies who were made parties defendant in the action), each plaintiff contended, in addition to insisting that it was not a distributor as defined by the statute, that the entire statute was invalid, on the ground that the exemptions embodied in subds. (d), (e), and (f) of § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subds. (d), (e), and (f), were in contravention of the equal protection clause of the fourteenth amendment to the Federal constitution and the privileges and immunities clause (Art. I, § 12) of the state constitution.

The discussion in the opinion in *Great Northern R. Co. v. Cohn, post* p. 591, — P. (2d) —, is restricted to the question whether the railway company is a distributor of fuel oil under chapter 186, Laws of 1939, or chapter 116, Laws of 1937, p. 459, if the latter act were held to be revived. The opinion in the case before us, which is an appeal by the state from the judgment holding the entire act (chapter 186, Laws of 1939) unconstitutional, is addressed to the question whether chapter 186, Laws of 1939, is unconstitutional in its entirety. Those two opinions obviate necessity of discussion in *Weyerhaeuser Timber Co. v. Cohn, post* p. 612, — P. (2d) —, of the two questions there raised.

The pertinent exemption provisions of § 15, chapter 186, Laws of 1939, read as follows:

"Sec. 15. The distributor shall be exempt from the tax herein imposed upon the following: . . .

"(d) Withdrawal, sale or distribution of petroleum products by a distributor to any vessel engaged in foreign commerce.

"(e) Withdrawal, sale or distribution by a distributor of all petroleum products derived from the refining within this state of crude petroleum or crude oil.

"(f) Withdrawal, sale or distribution of petroleum products by a distributor to any person who is subject to tax under title V, chapter 180, Laws of 1935, and amendments thereto, and who purchases such petroleum products for the purpose of converting and who does actually convert the same into manufactured gas for distribution to the public."

The fourteenth amendment to the constitution of the United States provides that:

"No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its juris liction the equal protection of the laws"

Article I, § 12, of the state constitution provides:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

[1] True, the legislature has broad powers respecting the classification of property for excise tax purposes, yet the foregoing provisions of the Federal and state constitutions forbid an arbitrary classification. The legislature may constitutionally classify persons with reference to their business occupation or inheritance, with a view of exaction from them of excise or privilege taxes differing in amount, or differing in that one class shall be taxed and another class shall be exempted, *so long as there may be* some *reasonable basis for such classification and* so long *as all in each class shall be taxed or exempted alike. State v. Hart,* 125 Wash. 520, 217 Pac. 45.

We stated in *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P. (2d) 1101, that, to comply with the equal protection clause of the Federal constitution and the privileges

and immunities clause of our state constitution, legislation involving classification must apply alike to all persons within the designated class, and reasonable ground must exist for making a distinction between those who are brought within the class and those who are excluded therefrom.

In refusing to sustain a tax upon the gross receipts of corporations operating taxicabs, when the tax was not imposed upon individuals and partnerships engaged in the same business, the supreme court of the United States said in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553:

"The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' "

See, also, *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310.

[2] The tax imposed by chapter 186, Laws of 1939, upon distributors at the rate of one-fourth cent for each gallon of petroleum products withdrawn, sold, distributed, or in any manner used by such distributor, amounts to approximately eleven per cent on the purchase price. Fuel oil and solid fuels such as coal, wood, sawdust, and coke, together with the mechanical contrivances incidental to their use such as oil burners, coal stokers, and sawdust burners, are marketed in competition with each other.

Chapter 186, Laws of 1939, violates the requirement that reasonable ground must exist for making a distinction between those who fall within the class and those who do not. No reasonable ground exists for making a distinction between those who fall within the classification of distributors of fuel subject to tax and distributors of fuel not subject to tax. That is, a distributor of fuel oil is required to pay a tax of approximately eleven per cent for the privilege of distributing fuel oil, while there is no comparable tax upon the distributors of coal, wood, sawdust, coke, gas and electricity.

All purchasers of fuel oil, as well as purchasers of coal, sawdust, wood and coke, are subjected to a compensating tax for the privilege of using in this state tangible personal property purchased at retail or produced or manufactured for commercial use. The result of the imposition of the fuel oil tax and the compensating tax is that users of fuel oil pay a tax of approximately thirteen per cent upon the fuel consumed by them, while users of the other fuels pay only the compensating tax of two per cent.

In *Pearson v. Seattle,* 199 Wash. 217, 90 P. (2d) 1020, we held that a city ordinance which imposed a license fee for revenue purposes, although ostensibly for regulatory purposes, on solid fuel dealers, while a similar license fee was not imposed on liquid fuel dealers, was unreasonable and discriminatory, therefore void, in that it singled out a particular business and imposed upon it special regulations and taxes when the ground had otherwise been fully covered by existing laws. (In that case, another ordinance was in force which applied alike to both liquid and solid fuel dealers.) We sustained the challenge that the city

could not, as it attempted by that ordinance, impose such a revenue tax under the guise of a police regulation.

To impose the compensating tax upon all persons in this state for the privilege of using tangible personal property in the state, and then to single out a particular group (users of fuel oil) and impose an additional tax upon them for the same privilege, is indefensible on constitutional grounds. It is violative of the rule that reasonable ground must exist for making a distinction between those who fall within, and those excluded from, the classification for tax purposes. It is, we repeat, in defiance of the purpose of the privileges and immunities provision of the state constitution and contravenes the equal protection provision of the Federal constitution.

[3] By subd. (d), § 15, chapter 186, Laws of 1939, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (d), the distributor shall be *exempted from* the *tax* upon withdrawal, sale or distribution of petroleum products to *any vessel engaged in foreign commerce.*

We do not find anywhere in the statute an extension of this exemption to railroads engaged in foreign commerce. Nor does the exemption extend to motor carriers or other persons or corporations engaged in foreign commerce. The legislature expressed, by this exemption provision, its intention to impose the tax upon railroads, motor carriers, and all other persons and corporations engaged in foreign commerce, but to exempt from the tax petroleum products withdrawn, sold, or distributed to vessels engaged in foreign commerce.

Plainly, the legislation does not apply alike to all persons within the designated class. There is no reasonable

ground for making a distinction between those who fall within the class and those who do not. *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P. (2d) 1101; *Supply Laundry Co. v. Jenner,* 178 Wash. 72, 34 P. (2d) 363; *State v. Hart,* 125 Wash. 520, 217 Pac. 45.

Subdivision (d), § 15, chapter 186, Laws of 1939, is unconstitutional. By that exemption subdivision, our legislature attempted to grant a special privilege to foreign commerce by vessel and denied a like privilege to foreign commerce by railroad, by motor carrier, or by other conveyances. States have no such power respecting interstate commerce. *South Carolina State Highway Department v. Barnwell Bros.,* 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510; *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *International Paper Co. v. Massachusetts,* 246 U. S. 135, 62 L. Ed. 624, 38 S. Ct. 292, Ann. Cas. 1918C, 617; *Webber v. Virginia,* 103 U. S. 344, 26 L. Ed. 565; *Baldwin v. Seelig,* 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55.

[4] Under § 1, chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21], a tax is imposed upon distributors, as defined in § 2 of the act, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], for each gallon of petroleum products withdrawn, sold, distributed, or *in any manner used by such distributors* within the state of Washington, except as expressly exempted by § 15 of the act.

Section 2 of the act includes within the definition of distributor those who refine within the state and those who acquire from those who refine within the state. Under subd. (e), § 15, chapter 186, Laws of 1939, all

persons who refine within the state and all persons who acquire from those who refine within the state are exempt from taxation on locally refined petroleum products withdrawn, sold, or distributed by such persons. It would follow, logically, that the consumers who purchase such products from retail distributors would not be required to pay a tax on locally refined petroleum products they use, as no tax was paid thereon which could be passed along to the consumers.

Locally refined products *used* by distributors are not exempted from taxation by subd. (e), § 15, chapter 186, Laws of 1939. That is, under this statute, the legislature selected from the group composed of all users of locally refined petroleum products a certain portion which it named "distributors," and imposed upon those within the selected group a use tax and exempted from that tax all other users of locally refined products. The exemption constitutes, also, an invalid discrimination in favor of local refineries and against distributors in petroleum products refined in other states.

The exemption under subd. (e), § 15, chapter 186, Laws of 1939, is void. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310; *State v. Robinson Co.*, 84 Wash. 246, 146 Pac. 628; *State v. Hart*, 125 Wash. 520, 217 Pac. 45; *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101; *Chalker v. Birmingham & N. W. R. Co.*, 249 U. S. 522, 63 L. Ed. 748, 39 S. Ct. 366; *Hale v. Bimco Trading Co.*, 306 U. S. 375, 83 L. Ed. 771, 59 S. Ct. 526.

The attorney general concurs in the view that subd. (e), *supra*, is unconstitutional, as disclosed by the following on page nineteen of appellant's brief:

"So far as this case is concerned, sub-section (e) of section 15 of the act, undertaking to exempt from the excise tax 'distributors' of products derived from refining within this state of crude petroleum or crude oil, in our opinion, discriminates in favor of Washington refineries and against distributors dealing in petroleum products refined in other states, imported into this state and here sold and such discrimination is violative of the equal protection clause of the 14th amendment to the constitution of the United States and section 12 of Article I of the constitution of the state of Washington."

[5] Subdivision (f), § 15, chapter 186, Laws of 1939, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35] subd. (f), under which the Seattle Gas Company is exempted from the fuel oil tax is unconstitutional.

The withdrawal, sale, or distribution of fuel oil by a distributor to any person who pays the public utility tax and uses the fuel oil to manufacture gas for distribution to the public is exempted by subd. (f), *supra*, from the tax imposed by the fuel oil statute (chapter 186, Laws of 1939).

There is no like exemption to other public utility companies which also pay a public utility tax and use the fuel oil to manufacture commodities or produce services for the use of the public. To state the facts is to declare the rule applicable thereto. The classification is so obviously, glaringly, arbitrary, capricious, and unreasonable that it seems hardly necessary to do more than invoke the equal protection clause of the 14th amendment to the Federal constitution and the privileges and immunities clause of our state constitution to strike

down this extension of special privilege to one public utility and denial to other public utilities of a like privilege of exemption. The exemption does not apply alike to all persons within a designated class, and no reasonable ground is shown for making a distinction between those who fall within the class and those who are outside the class. *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101.

It is not a sound argument that the gas companies are not within the class designated as distributors upon whom the tax is imposed because they pay the public utility tax and they convert the petroleum products into a manufactured product (gas) for distribution to the public. True, the gas industry converts fuel oil into gas for the use of the public. The railway companies convert the fuel oil into transportation for the use of the public. Light and power companies operating in this state use fuel oil in generating units (steam plants) operated to manufacture electrical energy for light, heat and power. Water carriers use fuel oil to produce transportation by boats of certain capacity operating upon the waters within the state. Certain highway transportation companies use diesel oil, which is a partially refined petroleum product, to manufacture transportation by motor vehicle. Other public utilities also pay the public utility tax. Whether they pay more or less than the gas company, is not material. The payment of the public utility tax is not a valid ground on which to base the exemption of the gas companies from the tax.

All of the public utility companies mentioned above consume the fuel oil—just like the gas company consumes the fuel oil—in producing a service, a commodity,

or a product, for the use of the public. It follows that the fact that the fuel oil is transmuted by the gas companies into manufactured gas is not a sufficient reason for the exemption of gas companies from the classification of those who are required to pay the fuel oil tax under chapter 186, Laws of 1939.

[6] Chapter 186, Laws of 1939, imposes a tax upon any person who acquires within the state petroleum products from any person importing same into the state, and upon any person who imports into the state and withdraws, sells, distributes, or in any manner uses the products within this state. The statute further requires such persons to pay a fee, file a surety bond, obtain a license, etc., as distributors. Those conditions constitute an unlawful burden on interstate commerce, hence unconstitutional. *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606; *State v. Yetter*, 5 S. E. (2) (S. C.) 291; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 S. Ct. 190; *Graves v. Texas Co.*, 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818; *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385.

[7] Next in order is the question whether, in view of § 21 (severability clause), chapter 186, Laws of 1939, p. 598, Rem. Rev. Stat. (Sup.), § 8370-80s [P. C. § 7029k-40], the invalidity of the exemptions in § 15, subds. (d), (e), and (f) of the act renders the act void as a whole.

If chapter 186, *supra*, is sustained when we invalidate subd. (d), a number of persons engaged in foreign commerce by vessel, which persons the legislature de-

clared were not to be taxed, will become subject to the tax. If we strike subd. (e) and sustain the act sans this subdivision, two refineries located within this state which the legislature said were to be exempt, will be required to pay the tax. In the event that we declared subd. (f) void and held that the remainder of the act was constitutional, all of the gas companies in the state which the legislature definitely, specifically, emphatically, stated were not to be taxed, would be rendered subject to the tax.

When chapter 186, Laws of 1939, was passed by the legislature and signed by the governor, a tax was imposed by that statute upon every distributor of petroleum products except those exempted by § 15. It would be contrary to the expressed intent of the legislature for us to sustain the act after striking down § 15, subds. (d), (e), and (f), and impose upon the persons included within those exemption clauses the distributors whom the legislature said were not to be taxed. Section 21, chapter 186, Laws of 1939, reads as follows:

"If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

In *Jensen v. Henneford*, 185 Wash. 209, 53 P. (2d) 607, we held that exemptions creating unconstitutional discriminations in the statute will not be stricken by this court and the remainder enforced, even if the act contains a severability clause and is an important revenue

measure, if the effect of so doing is to broaden the scope of the act so as to extend its provisions to a class of persons the legislature has said were not to be included. In that case, we held the personal net income tax law of 1935 (Laws of 1935, chapter 178, p. 660) was unconstitutional in its entirety, despite the argument of the attorney general that the sections creating lack of uniformity could be stricken and the remainder of the statute enforced because of the presence in the act of a severability clause to the effect that, if any section, clause, or part of the act were adjudged invalid or unconstitutional, such adjudication should not affect the remaining portions of the statute.

Section 2 of the income tax statute, p. 661, is analogous to § 1, chapter 186, Laws of 1939, and provided for the levy, collection, and payment to the state for each income year by every resident of this state for the privilege of receiving income within this state, a normal tax with respect to his income at the rate of three per cent of the amount of the net income in excess of the credits against net income as provided in §§ 9 and 10 of the act, pp. 670, 671. We held that §§ 9 and 10 must be read as a part of § 2(a), p. 661. By § 10 a married man was allowed a higher credit against the net income than a single man, which destroyed the uniformity of the act. *Jensen v. Henneford,* 185 Wash. 209, 53 P. (2d) 607, is controlling. It is not distinguisheable in principle from the case at bar. In the course of our opinion in that case, we said:

"The question then arises whether the objectionable features of the normal tax may be eliminated, under the provisions of § 70, and still leave a complete and workable act. In our opinion, any process of elimination exer-

cised under § 70 would destroy the act entirely. This would be true whether § 10 be considered by itself or read as part of § 2(a).

"If, considering § 10 by itself, we eliminate the credit allowed to single persons, it would not remedy the situation but, manifestly, would make it worse. If, on the other hand, we eliminate the credits allowed to married persons and those having dependents, the same result would follow. If we eliminate the entire section, then we will not merely have taken something from the act, but will have added something to it, because the act would then operate on all net incomes of whatever amount. But the legislature never contemplated, nor intended to accomplish, such a result. The wording of the section shows a contrary intention.

"If we consider § 10 as part and parcel of § 2(a), as it should be, then we face an even more difficult situation. It would be impossible to translate § 10 into § 2(a) in such a way that any part of it could be eliminated without completely mutilating the latter section. We would have to clip sentences midway in their expression, or else sever bodily from the section the words 'in excess of the credits against net income as provided in sections 9 and 10.' In either event, we would, as stated above, effect a result that the legislature never contemplated nor intended to accomplish. In short, any attempt at elimination would involve a complete reconstruction, indeed, a re-creation, of the act and would result in imputing to the legislature an intention which the present wording of the act does not sustain. Such a process indulged in, would not be judicial, but would be legislative, and would assume a power that we are not permitted to exercise. *Hill v. Wallace*, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822; *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala, 492, 86 So. 56, 11 A. L. R. 300."

In *Hill v. Wallace*, 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453, the constitutionality of a Federal taxing act (42 Stat. 187) entitled "An Act Taxing contracts for the sale of grain for future delivery . . . and for other purposes." was challenged. Section 11 of that act (42

Stat. 191) contained a severability clause. In holding that that clause did not give the court power to rewrite an invalid statute so as to make it enforcible, the supreme court of the United States said:

"Section 11 does not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court . . .

"It (severability clause) does not give the court power to amend the act."

If § 15, subds. (d), (e), and (f) were stricken and the remaining provisions of the act enforced, including the penalties prescribed by the statute, then the scope of chapter 186, Laws of 1939, would be extended to make that a crime which the legislature said was not to be a crime.

Distributors to vessels engaged in foreign commerce and to local gas companies and to local refiners, merely by the conduct of their businesses without payment of the tax, would be made liable to criminal prosecution, fines and imprisonment under § 16 of the act, p. 596, Rem. Rev. Stat. (Sup.), § 8370-80n [P. C. § 7029k-36], although the legislature declared in § 15 that they were not to be taxed and therefore not to be liable to such punishment for failure to pay taxes.

In *State v. Gantz*, 124 La. 535, 50 So. 524, 24 L. R. A. (N. S.) 1072, the supreme court of Louisiana, in holding that an entire act was unconstitutional because of a discriminatory exemption, said:

"We will now discuss whether the illegal exemption, because illegally discriminative, vitiates the whole statute.

"It does evidently. It is a criminal statute, as it defines a crime.

"By striking out the exemption as unconstitutional, it leaves subject to criminal prosection those the Legislature expressly intended should be exempt.

"As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will."

The rule is summarized as follows in 11 Am. Jur. 855, § 161,

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

It is next argued that, if chapter 186, Laws of 1939, is unconstitutional, the fuel oil tax act (title XI,, chapter 180, Laws of 1935, p. 749, as amended by chapter 116, Laws of 1937, p. 459) is restored to full force and effect, and that the trial court should have entered judgment in favor of appellant for the amount of tax due under the 1937 act.

That question is not in this case. The cause was tried on the theory that the state was entitled to recover under the provisions of chapter 186, Laws of 1939. The question, which was not presented in the trial court, of the revival of the prior fuel oil tax stautte, cannot for the first time be raised in this court.

There is also the factor which must be considered of proof of how many gallons of fuel oil respondent re-

finery sold and distributed during May, 1939, for which it might be liable to taxation under chapter 116, Laws of 1937.

[8] The contention of appellant that the railway company, which raised the constitutional question in this case, should not have been permitted to intervene in this action is without merit. Disregarding the question whether appellant waived its right to object to the intervention of the railway company, the statute (Rem. Rev. Stat., § 202 [P. C. § 8280]) is a sufficient answer to the argument of appellant. That section of the statute permits any person to intervene in an action who has an interest in the matter in litigation, in the success of either party, or an interest against both. The railway company, under its contract with the Inland Empire Refineries, Incorporated, was required to pay, in addition to the stated price per barrel for fuel oil, any tax lawfully found due.

The judgment is affirmed.

STEINERT, SIMPSON, BEALS, GERAGHTY, ROBINSON, and JEFFERS, JJ., concur.

BLAKE, C. J. (dissenting)—I dissent. As I view it, there is only one ground of the attack on the constitutionality of chapter 186, Laws of 1939, that has a semblance of validity. That is the exemption allowed under § 15, subd. (e), upon the "withdrawal, sale or distribution by a distributor of all petroleum products *derived from the refining within this state* of crude petroleum or crude oil." (Italics mine.) Obviously, this is an unconstitutional discrimination in favor of persons and corporations engaged in refining petroleum and crude oil

in this state. But it does not follow that the entire act must fall. For, by § 21, it is provided:

"If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

By this section, the legislature declared in language as plain as English can express that it was its purpose to lay the tax upon all distributors if the exemption defined in § 15, subd. (e), were unconstitutional. In other words, the exemption falls and the act stands as though the exemption had been omitted by the legislature itself. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. Ed. 1038, 52 S. Ct. 548; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 235; *Ex parte Schmolke*, 199 Cal. 42, 248 Pac. 244; *Di Lustro v. Penton*, 106 Fla. 160, 142 So. 898; *Gulfport Building & Loan Ass'n v. Gulfport*, 155 Miss, 498, 124 So. 658; *Boyd v. State*, 217 Wis. 149, 258 N. W. 330; *State ex rel. Attorney General v. Tittmann*, 42 N. M. 76, 75 P. (2d) 701; *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S. W. (2d) 251; *Ingels v. Riley*, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A. L. R. 1; *Johnson v. Long Furniture Co.*, 113 Miss. 373, 74 So. 283; *Smith v. Wilkins*, 164 N. C. 135, 80 S. E. 168; *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 So. 692; *People v. Stokes*, 281 Ill. 159, 118 N. E. 87; *Fairley v. Duluth*, 150 Minn, 374, 185 N. W. 390, 32 A. L. R. 1258; *State ex rel. Dillon v. Braxton County Court*, 60 W. Va. 339, 55 S. E. 382; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149.

In the first case above cited, an act was under consideration which provided for an excise tax on the production of electric energy for sale. Power furnished for pumping water for irrigation purposes was exempted from the operation of the act. The act contained a saving clause similar to § 21 of chapter 186, Laws of 1939. Addressing itself to the exemption and the effect of its invalidity upon the act as a whole, the court said:

"A further contention is that § 5 is an inseparable part of the act, and being unconstitutional, the entire act must fall with it. . . .

"The act itself (§ 11) provides that an adjudication that any provision of the act is unconstittuional shall not affect the validity of the act as a whole, or of any other provisions or section thereof. While this declaration is but an aid to interpretation and not an inexorable command . . . it has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. . . .

"It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including § 5. The primary object of the statute, under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act. was to be preserved even though the specified exemptions should fall for lack of validity."

Of a tax exempting "notes or bills for work or labor done," it was said in *Fox's Appeal, supra:*

"The exception . . . is void, under this provision, and drops out of the Act of 1885. The exception falls, but the Act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals."

MAIN, J., concurs with BLAKE, C. J.

APPENDIX B

[No. 27854. *En Banc.* April 26, 1940.]

GREAT NORTHERN RAILWAY COMPANY, *Respondent*, v. DAVE S. COHN, *as acting Director of Licenses, Appellant.*[1]

[1] Statutes—Subjects and Titles—Expression in Title of Subject.

[2] Same—Construction—Intrinsic Aids to Construction—Title and Headings.

[3] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[4] Taxation—Double Taxation—Presumptions.

[5] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[6] Statutes—Construction—Reference to Other Statutes—Repealed or Superseded Acts.

[7] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[8] Same.

[9] Statutes—Construction—Retrospective Operation.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 27, 1939, upon findings in favor of the plaintiff, in an action under the declaratory judgment act to obtain a declaration of rights under a taxing statute. Affirmed.

The Attorney General, John E. Belcher and *L. C. Brodbeck, Assistants*, for appellant.

Thomas Balmer, Edwin C. Matthias, and *Anthony Kane*, for respondent.

Poe, Falknor, Emory & Howe, Wallace G. Mills, Harold P. Troy, and *E. W. Anderson, amici curiae.*

MILLARD, J.—Chapter 186, Laws of 1939, p. 581 (Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21] *et seq.*), which repealed chapter 180, Laws of 1935, p. 706, as amended by chapter 116, Laws of 1937, p. 459, imposes

upon each person engaged in the oil distribution business, in addition to any other tax provided by law, an excise tax upon each distributor of one-fourth of one cent for each gallon of fuel oil "withdrawn, sold, distributed, or in any manner used by such distributor" within this state, except as expressly exempted by § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35].

Section 15, chapter 186, Laws of 1939, provides that petroleum products withdrawn, sold, or distributed to any vessel engaged in foreign commerce, petroleum products withdrawn, sold, or distributed that are derived from crude oil refined within this state, petroleum products withdrawn, sold, or distributed to those who pay a public utility tax and who use the same to produce manufactured gas, shall be exempt from the tax.

On the theory that the section exempting those who withdraw, sell, or distribute petroleum products derived from the refining within this state of crude petroleum or crude oil was unconstitutional, and if given effect rendered the entire statute unconstitutional, the attorney general of this state instituted an original proceeding in mandamus in this court March 22, 1939, to reuire the acting director of licenses to collect the tax imposed by chapter 186, *supra*, from distributors of petroleum products derived from crude oil refined within this state. The application for the writ was denied without written opinion.

Subsequently, an action was brought by the attorney general in the superior court for Thurston county to require the acting director of licenses to collect the tax from the exempted distributors just described. Motion

to quash was granted on the ground that the original proceeding in this court was *res adjudicata*. On appeal of the attorney general from the judgment of dismissal, we held that the original mandamus proceeding in this court was dismissed solely on the ground of prematurity, and that we did not pass upon the question of constitutionality of the exemption provisions of the statute. *State ex rel. Hamilton v. Cohn,* 101 Wash. Dec. 45, 95 P. (2d) 38. The cause was remanded to the trial court with direction to overrule the motion to quash.

On the ground that it is not a distributor as that term is defined in chapter 186, Laws of 1939, with respect to any of the fuel oil used by it, as hereinafter described, and on the further ground that, if it is held to be a distributor within the purview of chapter 186, *supra*, the statute is unconstitutional, the Great Northern Railway Company brought this action against the acting director of licenses of this state, joining the Tidewater Associated Oil Company as a party defendant, to obtain a declaration of its rights under the uniform declaratory judgment act (Laws of 1935, chapter 113, p. 305; Laws of 1937, chapter 14, p. 39; Rem. Rev. Stat. (Sup.), § 784-1 [P. C. §8108-21] *et seq.*) and for injunctive relief.

Trial of the cause to the court resulted in findings and judgment to the effect that chapter 186, Laws of 1939, is unconstitutional in its entirety, and that the statute has no application to the distribution, withdrawal, or use of fuel oil by anyone who is not engaged as his principal pursuit in the business of distributing, selling, withdrawing, or in any manner using petroleum products. The appeal is prosecuted from that decree by the acting director of licenses of this state.

It is the position of appellant that, while the state is inhibited by the Federal constitution from taxing imports or the business of importing, respondent may be required, under subd. (a), § 2, chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], subd. (a), reading as follows, to pay the excise tax on the fuel oil shipped from California in tank steamers as that oil was acuired by respondent from the importer who did not pay the tax:

"(a) 'Distributor' shall mean and include . . . any person, firm, association or corporation who acquires the same within the state from any person refining it within or importing it into the state on which the tax of one-quarter (¼) cent per gallon has not been paid; . . ."

That is, the respondent may be required to pay the excise tax for the privilege of having acquired the fuel oil from the importer within the state and thereafter withdrawing the fuel oil from storage and using that oil within this state. Appellant concedes that, under our holding in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, and *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, on shipments by tank steamships from California and delivered to the railroad company in this state, the oil company and not the railroad company was the importer.

It is insisted by appellant that, as to the oil imported by respondent from Montana and Oregon in railroad tank cars and unloaded therefrom into respondent's storage tanks in the state of Washington and thereafter withdrawn and used by respondent within this state, respondent is a distributor under that part of subd. (a), § 2, chap-

ter 186, *supra*, which defines the third class of distributors as follows:

"(a) 'Distributor' shall mean and include . . . any person, firm, association or corporation who imports the same into this state and withdraws, sells, distributes or in any manner uses the same in this state."

It is urged that the question of interference with interstate commerce is answered in both instances by the statutory imposition of the excise *tax not on the importation but for the privilege of withdrawing the oil from storage after the interstate transportation* has ended and the oil has ceased to be an import.

Another contention of appellant is that, if the exemption features of chapter 186, *supra*, contravene the state and Federal constitutions, the discriminatory exemptions may be stricken from the statute, and the remainder of the act will be a complete and workable revenue measure which is valid, in view of the legislative declaration in § 21 of the statute, p. 598, Rem. Rev. Stat. (Sup.), § 8370-80s [P. C. § 7029k-40], that, if any section, etc., of the act is held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the statute.

Counsel for respondent insist that it is not engaged in business as a distributor of fuel oil, therefore respondent is not subject to the tax in question. A second ground urged by respondent is that chapter 186, Laws of 1939, is unconstitutional in that it violates certain provisions of the Federal and state constitutions.

Respondent railway company is engaged solely in the business of railroading. Its use of fuel oil is incidental to its railroad business. It buys fuel oil from local

refiners and from refiners and oil companies located in Oregon and Montana. Respondent brings the fuel oil purchased by it in Oregon and Montana into this state as company material and property of the railway company. It buys fuel oil refined in California from the Tidewater Associated Oil Company and takes delivery of that oil at tidewater in this state.

All of this fuel oil is placed by respondent in its stationary storage facilities, and respondent withdraws and uses that oil to produce the power by which its trains are operated. That is, respondent is engaged in the business of railroading and is not engaged in the business of selling, withdrawing, or distributing fuel oil. None of the fuel oil received by respondent is sold or distributed by respondent to other parties. We cannot stress too strongly the fact that the railroad company is not engaged in the business of using fuel oil, but is engaged solely in the railroad business and uses or consumes fuel oil just as it uses or consumes other supplies in conducting the business of railroading.

The fuel oil used by respondent in the operation of its trains between May 1, 1939, the effective date of chapter 186, Laws of 1939, and the trial of this cause, was acquired from four sources: Approximately seven million gallons were on hand and in storage when the act became effective; sixty thousand eight hundred and fifty-nine gallons, which were acquired after May 1, 1939, from the Inland Empire Refineries, Inc., which distributor is exempted by subd. (e) of § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (e), from the excise tax (which exemption appellant concedes is discriminative and violates

the equal protection clause of the fourteenth amendment to the Federal constitution and § 12 of Art. I of the state constitution); five million two hundred forty thousand and seventy-six gallons which were acquired from the Tidewater Associated Oil Company and transported and delivered to respondent at tidewater in this state in the same manner as the fuel oil was delivered to the Great Northern Railway Company by the Associated Oil Company described in the opinion of this court in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694; and more than six million gallons of fuel oil which were purchased by respondent and delivered to it in tank cars on respondent's tracks in Oregon and Montana and brought by respondent into this state as property of the railway company.

The statute (chapter 186, Laws of 1939, p. 581) challenged by respondent, is entitled:

"An Act providing an excise tax upon the business of distributing, selling, withdrawing or in any manner using refined or partially refined liquid or liquefiable petroleum products, . . ."

Section 1 of the statute, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21], imposes the tax

". . . upon every distributor . . . for each gallon of refined or partially refined liquid or liquefiable petroleum products withdrawn, sold, distributed or in any manner used by such distributor in the State of Washington, except as expressly exempted by section 15."

Three classes of persons are defined by § 2 of the act, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], as distributors. The first class consists of those who refine, manufacture, or compound liquid or liquefiable petroleum products, *and* withdraw, sell, dis-

tribute, or in any manner use the same within this state. The second class of distributors is composed of those who acquire the petroleum products within this state from any person refining it within or importing it into this state, on which the tax of one-fourth of one cent a gallon has not been paid. The third class of distributors is defined as those persons who import the products into this state *and* withdraw, sell, distribute or in any manner use the same in this state.

[1] Article II, § 19, of the state constitution provides that no bill shall embrace more than one subject and that shall be expressed in the title; therefore, if an act is broader than its title or embraces subjects not included in the title, it contravenes Art. II, § 19, of the state constitution.

[2] In determination of the question whether the title of an act is in compliance with the constitutional requirement invoked by respondent, the title must be construed with reference to the language used in the title only and not in the light of the context of the act.

[3] It is clear that, in construing chapter 186, *supra,* with reference to the language employed in the title, the tax is on the business of dealing in petroleum products measured by the number of gallons withdrawn, sold, distributed, or used by such distributor, and was not intended to be a tax upon the business of using fuel oil in the operation of a railroad. That this is so, is readily disclosed by an examination of the provisions of other excise tax statutes enacted at the 1939 session.

In addition to *ad valorem* taxes paid by respondent during 1938, respondent paid to the state during 1939 ex-

cise taxes imposed under title V, chapter 180, Laws of 1935, p. 728, as amended and reenacted by chapter 227, Laws of 1937, p. 1138, and chapter 225, Laws of 1939, p. 976, "for the act or privilege of engaging within this state in the business of operating any railroad, by whatever power operated."

In 1933, a tax for the privilege of engaging in the railroad business was first imposed. The enactment, known as the occupational tax, was chapter 191, Laws of 1933, p. 869, and is entitled: "An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities . . . " Under that statute, a tax was exacted, for the privilege of engaging in the railroad business, at the rate of one and one-half per cent of the gross income derived from such business. In sustaining the constitutionality of that statute, we said, regarding the scope of the tax, in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 408, 25 P. (2d) 91:

"We have, then, a measure which evidences the purpose to tax the privilege of carrying on those businesses which are, in a broad sense, commercial in their nature, buying for resale at a profit, producing for sale, transporting and financing for profit (which are recognized as an important part of production), and all like enterprises which look to the purpose of bringing usable commodities of various sorts into the hands of the ultimate consumer."

Chapter 191, Laws of 1933, was reenacted by chapter 180, Laws of 1935, which chapter is divided into titles. The business and occupational tax became title II, p. 709, and a new tax entitled "public utility tax" became title V, p. 728. Titles II and V are almost the same, except that title V is applicable to public service companies and title II to business generally.

The first section of title V, which is § 36 of chapter 180, p. 728, provides that,

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. Such tax shall be equal to the gross operating revenue of the business, multiplied by the rate set out after the business, as follows:

"I. Railroad, . . . three per cent; . . . "

"Sec. 37. For the purposes of this title, unless otherwise required by the context:

"(a) The term 'railroad business' means the business of operating any railroad, by whatever power operated, for public use in the conveyance of persons or property for hire: . . . "

The activity for which the tax was imposed was for the act or privilege of engaging within this state in the business of operating any railroad by whatever power operated.

In *Seattle Gas Co. v. Seattle,* 192 Wash. 456, 73 P. (2d) 1312, 77 P. (2d) 382, we said, regarding the nature of the tax imposed:

"Although not distinguishing the exaction from a sales tax, this court, in *State ex rel. Stiner v. Yelle,* 174 Wash. 402, 25 P. (2d) 91, said:

" 'The privilege of engaging in business and gainful pursuits under the protection of our laws is something which must and does exist before the business can be established, and something far and away beyond and above the mere ownership of a business . . .

" 'This is the privilege . . . which it is now sought to tax.' "

The occupational tax imposed by chapter 191, Laws of 1933, and the public utility tax imposed by title V, chapter 180, Laws of 1935, were both sustained as a tax

upon the privilege of engaging in certain businesses, including the railroad business.

The legislature imposed a tax of three per cent on gross revenue for the privilege of engaging within this state in the railroad business and defined the phrase *"railroad business"* as the *business of operating any railroad, by whatever power operated.* (§§ 36, 37, chapter 180, Laws of 1935, p. 728.) We construed that statute as imposing a tax for the privilege of engaging in the business taxed. That statute was reenacted by the legislature in 1937 (§§ 10, 11, chapter 227, Laws of 1937, pp. 1150, 1151) and in 1939 (§§ 19, 20, chapter 225, Laws of 1939, pp. 998, 999, Rem. Rev. Stat. (Sup.), §§ 8370-36, 8370-37 [P. C. §§ 7030-96, 7030-97]).

The fuel oil tax statute (chapter 186, Laws of 1939) passed the Senate March 2nd, passed the House March 8th, and was signed by the governor March 17, 1939. Chapter 225, Laws of 1939, which reenacted the public utility tax passed the Senate March 9th, passed the House March 9th, and was signed by the governor March 21, 1939. Both acts became effective May 1, 1939.

The two statutes must be read *in pari materia.* So read, it could not be logically held that, by chapter 186, Laws of 1939, the legislature intended to impose a tax upon a railway company for the privilege of using fuel oil in the operation of its trains, when by the title of the act the tax is imposed upon the business of distributing, selling, withdrawing, or in any manner using fuel oil, when, at the same session, the legislature reenacted by chapter 225, Laws of 1939, the public utility tax law imposing a tax upon railroad companies for the privilege of

engaging in the business of operating a railroad by whatever power operated. Surely, the legislature would not have undertaken, by the method of passing two different statutes at the same legislature, to exact two different taxes of respondent, one for the privilege of engaging in the railroad business by whatever power operated and another for the privilege of using fuel oil to generate that power.

The privilege of engaging in the railroad business by whatever power that business is operated must include the privilege of using fuel oil essential to the operation of its trains, the operation of which constitutes the railroad business.

In *Jensen v. Henneford,* 185 Wash. 209, 218, 53 P. (2d) 607, in holding the net income tax law unconstitutional, we said:

"But the mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself. [Citing authorities.]

"The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever. 'In common understanding, to hold property is to own it. In order to own or hold, one must acquire.' . . . The right to receive, the reception, and the right to hold, are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and, therefore, the property (income) itself."

So, too, if one is to engage in the business of railroading, one must operate trains. Trains cannot be operated without motive power, and in order to utilize motive power, one must consume fuel. It is indispensable to

the right to operate trains, to consume fuel to produce the motive power necessary to that operation. To tax any one of these elements, is to tax their sum total, viz., the right to engage in the business; and, of course, to tax their sum total is to tax all of the necessary elements.

[4] The result would be double taxation if chapter 186, Laws of 1939, be construed as imposing a tax on the railway company for the privilege of using fuel oil to generate power to operate its trains. The presumption is against the intention of the legislature to impose double taxation on the same property, and that presumption prevails unless overcome by the express words of statute. *State ex rel. Wolfe v. Parmenter,* 50 Wash. 164, 174, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; 61 C. J. 137, § 71.

The privilege of engaging in the business of operating a railroad, as well as using the fuel, were taxed under the provisions of chapter 225, Laws of 1939, and were taxed under the provisions of titles IV and V of chapter 180, Laws of 1935, pp. 726, 728, as amended by chapter 191, Laws of 1937, p. 943, and chapter 227, Laws of 1937, p. 1138, before chapter 186, Laws of 1939, p. 581, was enacted. There is no reasonable basis for the conclusion that it was intended to include the railroad business in the business intended to be taxed under the title of chapter 186, Laws of 1939.

[5] Our first fuel oil tax statute was enacted as title XI of chapter 180, Laws of 1935, p. 749. That revenue act was entitled, in part:

"An act relating to revenue and taxation; . . . providing for the levy and collection of a tax upon the sale, use or distribution of fuel oil and diesel oil . . . "

On January, 1936, an action was commenced by the state to recover the amount of the tax assessed, under title XI, chapter 180, Laws of 1935, upon a shipment of fuel oil from California by an oil company to the Northern Pacific Railway Company. This was prior to the enactment of chapter 116, Laws of 1937, p. 459, which amended title XI, chapter 180, Laws of 1935. On May 3, 1938, we held in the action by the state to collect the tax (*State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090) that, although title XI which included §§ 78 to 81, inclusive, of chapter 180, of the Laws of 1935, pp. 749 to 751, is captioned "fuel oil tax," it was clear from the language of § 78, p. 749, that the tax therein provided was not a tax on fuel oil, but it was an excise tax imposed upon persons with respect to the privilege of distributing fuel oil. We further hold that the Northern Pacific Railway Company was not a distributor of fuel oil, therefore it was not liable for the tax imposed by title XI, chapter 180, Laws of 1935.

In 1937, the legislature enacted chapter 116, Laws of 1937, which amended title XI, chapter 180, Laws of 1935. The act was entitled: "An Act providing an excise tax upon the business of selling fuel oil . . . " That act became effective March 13, 1937, which was prior to the filing of our opinion in *State v. Fidelity & Deposit Co., supra.* The amendatory statute *changed* the nature of the tax *from* one for the *privilege of distributing fuel oil to* a *tax upon* the *business of selling fuel oil.*

The question whether the tax imposed by title XI, chapter 180, Laws of 1935, was intended to be restricted to those dealing in the distribution of fuel oil as a busi-

ness or also to be applied to those who used fuel oil, where withdrawal and distribution are incidental to the principal use, was not involved in *State v. Fidelity & Deposition Co.*, 194 Wash. 591, 78 P. (2d) 1090, or in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694.

Chapter 186, Laws of 1939, broadened the base of the tax and made the tax applicable to all refined or partially refined liquid or liquefiable petroleum products, rather than restricting the tax to fuel and diesel oil, as in the 1935 and 1937 statutes. Chapter 186, Laws of 1939, is entitled:

"An Act providing an excise tax *upon the business of* distributing, selling, withdrawing or in any manner using refined or partially refined liquid or liquefiable petroleum products, . . . and repealing . . . [Title XI], chapter 180, Laws of 1935 as amended by chapter 116, Laws of 1937. . . . " (Italics ours.)

It is clear to us that, by again using the word "*business*" in the title of chapter 186, Laws of 1939, as it did in chapter 116, Laws of 1937, but as it refrained from doing in chapter 180, Laws of 1935, the legislature plainly indicated its intention to impose a *tax upon the business of distributing* petroleum products *rather than upon the use of petroleum products in a business where* the *use and distribution* of such products *are* merely *incidental to* the *principal business*.

[6] In the construction of statutes which reenact with certain changes, or repeal, former statutes, or which contain revisions or codifications of earlier laws, resort may be had to repealed and superseded statutes *in pari materia*. An apt authority is *In re Phillips' Estate*, 193 Wash. 194, 74 P. (2d) 1015, in which we held that, in the

construction of a statute which restricted the inheritance of pretermitted heirs by the omission of the word "descendants" of certain heirs in one clause, it is proper to consider the repealed or superseded act, including the word in the same section of the former act *in pari materia*, from which an intent to change the law must be presumed.

[7] On September 1, 1939, which was subsequent to the effective date (May 1, 1939) of chapter 186, Laws of 1939, we held in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, that the railway company, under facts not materially dissimilar from those in *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, was not a distributor under chapter 180, Laws of 1935, and chapter 116, Laws of 1937; and that the only change in the 1935 statute by the 1937 enactment was to discontinue the tax on use. The legislature repealed instead of amended the 1935 and 1937 fuel oil statute and, by the title it gave to the 1939 enactment (chapter 186, Laws of 1939), indicated its intention, once more, to change the tax to a tax upon "the business."

The reason in the legislative mind for this change may have been the fact that the public utility tax statute exacted a tax for the privilege of engaging in various businesses, among which was "the operation of a railroad, by whatever power operated," and the compensating tax statute, imposed a tax for the privilege of using tangible personal property purchased at retail or produced or manufactured for commercial use. Hence, the fuel oil tax statute should be restricted to a tax upon the fuel oil distribution business and should not cover

the field already occupied by the public utility and compensating taxes.

That the legislative intent was to limit the fuel oil tax to persons engaged in the business of dealing in refined or partially refined liquid or liquefiable petroleum products, is evidenced when we construe, as we stated above, *in pari materia* and in accordance with their titles, the compensating tax statute and the fuel oil and public utility tax statute. Further (chapter 186, Laws of 1939), an examination of the entire fuel oil tax statute will disclose a number of provisions which conclusively establish such legislative intent.

Section 3 of chapter 186, Laws of 1939, p. 582 (Rem. Rev. Stat. (Sup.), § 8370-80a [P. C. § 7029k-23]), provides that every person, before becoming a distributor or continuing *in business as a distributor,* shall make an application to the director of licenses for a license authorizing such distributor or person *to engage in business as a distributor.* The section further provides that, before granting any license authorizing any person *to engage in business as a distributor* the director of licenses must require such person to file a bond with said director.

Section 4, p. 584 (Rem. Rev. Stat. (Sup.), § 8370-80b [P. C. § 7029k-24]), provides that, when the application for a license has been accepted and the filing fee therefor has been paid and the bond filed and approved, the director shall issue to such distributor a license *to transact business as a distributor* in this state. The director is then required to issue to the licensee a certificate, which the distributor is required to display conspicuously *at his place of business* in this state. In the event that any application for license *to transact business as a*

distributor in this state is filed by any person whose license shall at that time have been canceled for cause by the director, the director shall, after a hearing, have the right to refuse to issue to such person a license to *transact business as a distributor* in this state.

Section 5, p. 586 (Rem. Rev. Stat. (Sup.), § 8370-80c [P. C. § 7029k-25]), provides that, *whenever* a distributor *ceases to engage in business as a distributor by reason of* the *discontinuance, sale, or transfer of* the *business of* such *distributor* it shall be the duty of such distributor to notify the director in writing at the time the discontinuance, sale, or transfer takes effect. Such notice shall give the date of discontinuance and, *in the event of a sale or transfer of the business,* the date of the discontinuance and *the name* and address of the *purchaser of the business.* If such notice is not given, the purchaser of the business becomes liable to the state for the amount of all taxes accrued against the distributor so selling or transferring his business to the extent of the value of the property and business to be acquired.

Section 6, p. 587 (Rem. Rev. Stat. (Sup.), § 8370-80d [P. C. § 7029k-26]), provides for monthly reports by the distributor of the gallonage of petroleum products withdrawn, sold, distributed, or used by such distributor.

Section 7, p. 587 (Rem. Rev. Stat. (Sup.), § 8370-80e [P. C. § 7029k-27]), provides for penalty for failure to promptly make tax payments and also penalizes one who acts as a distributor without first securing the distributor's license required under the act.

Section 9, p. 591 (Rem. Rev. Stat. (Sup.), § 8370-80g [P. C. § 7029k-29]), requires each distributor to keep a

true and accurate record of his "transactions in petroleum products."

Under § 13, p. 593 (Rem. Rev. Stat. (Sup.), § 8370-80k [P. C. § 7029k-33]), the director of licenses is authorized to cancel the license of any distributor ". . . if said director shall ascertain and find that the person to whom such license has been issued *is no longer engaged in the business of a distributor.* . . ." (Italics ours.)

Section 20, p. 598 (Rem. Rev. Stat. (Sup.), § 8370-80r [P. C. § 7029k-39]), provides that "The tax herein levied is in lieu of any excise, privilege or occupational tax upon the business of withdrawing, selling or distributing petroleum products . . ."

Manifestly, the foregoing provisions of chapter 186, Laws of 1939, disclose the legislative intent was not to tax the mere use or consumption of petroleum products, first covered by other tax statutes, but the intent was to tax those persons who are engaged in the business of dealing in such products. Section 20 of the statute declares that the tax is in lieu of any excise or privilege tax upon the business of withdrawing, selling, or distributing petroleum products, and, like the other provisions of the act, it will be noted, relates to "the business of withdrawing, selling or distributing petroleum products."

Respondent, by use of fuel oil in the operation of its trains, is not engaged as a distributor in "the business of distributing, selling, withdrawing or in any manner using petroleum products." No useful purpose would be served by citing—and quoting profusely therefrom—the numerous authorities in harmony with the view we have expressed above.

The second ground—unconstitutionality of chapter 186, Laws of 1939—urged by respondent for affirmance of the judgment is sustained in *State v. Inland Empire Refineraies, Inc., ante* p. 573, — P. (2d) —.

[8] The position of appellant that, if chapter 186, Laws of 1939, is unconstitutional, respondent is subject to the tax imposed by chapter 116, Laws of 1937, which is revived by the voiding of chapter 186, Laws of 1939, is not tenable.

As we stated earlier in this opinion, the legislature evinced very clearly its intention when it enacted chapter 116, Laws of 1937, to impose an excise tax upon the business of selling fuel oil. It should be borne in mind that, under the provisions of chapter 180, Laws of 1935, the tax was imposed upon distributors for each gallon sold, distributed, withdrawn, or used by distributors. That provision was changed by § 1, chapter 116, Laws of 1937, p. 459, to provide for a tax for each gallon "sold, distributed or withdrawn by him."

The legislature, by the 1937 statute, restricted the fuel oil tax to those engaged in the business of selling. The only change in the 1935 statute by the 1937 enactment was, as we said in *Great Northern R. Co. v. State,* 200 Wash. 392, 93 P. (2d) 694, to discontinue the tax on use. In the case cited, the question before us was whether the railway company imported the fuel oil and thereby came within the definition of distributor. We held that it did not. There was not presented to us for determination the question whether, if the railway company was the importer of the fuel oil, it would be subject to tax on oil brought in for use in the operation of the railway company's line of railroad.

Even if the 1937 act were revived, respondent would not be subject to the fuel oil tax, in view of the fact that it does not sell fuel oil. Such use as respondent makes of fuel oil is incidental to respondent's operation of its railroad. It is clear that chapter 186, Laws of 1939, which became effective May 1, 1939, on which date respondent had in storage in this state more than six million gallons of fuel oil, does not by its terms apply to that oil; and it cannot, it is equally plain, under rules long since enunciated and consistently followed, of statutory construction, be made to apply to that oil. To be taxable under chapter 186, Laws of 1939, one must be a distributor. To be a distributor, as defined by the statute, one must fall within one of three classes of persons, viz., (1) persons who refine, manufacture, or compound liquid or liquefiable petroleum products, *and* withdraw, sell, distribute or in any manner use the same; (2) persons who acquire such products within this state from any person who refines it within or imports it into this state on which the prescribed gallonage tax has not been paid; (3) persons who import such products into this state *and* withdraw, sell, distribute or in any manner use the same within this state.

Surely, no one will argue that the first definition applies to the respondent. If the respondent is a distributor with respect to the oil asquired prior to the effective date of the statute, it would have to be under the second or third definition.

The second definition defines a distributor as one who *acquires* the petroleum within the state from another who has not paid the tax. The acquisition alone makes one a distributor, but it only makes such a person a dis-

tributor who acquires the products. It has no relation to one who previously made the acquisition. The word "acquires" is clearly in the future sense. If the legislature intended to define as a distributor one who had "acquired" such products, it could and, doubtless, would have said so in terms.

The rule is that the intention of the legislature is to be deduced from what it said, and that a tax will not be extended by construction to things not named or described in the statute. Both importation and withdrawal or use are necessary to constitute a person a distributor under the third definition. Either the importation or the withdrawal or use will not have that effect, and both the importation and the withdrawal or use must occur subsequent to the effective date of the statute. Respondent did not, after the effective date of the statute, import the fuel oil under consideration at this point, hence it is not a distributor with respect to that oil.

[9] Even a cursory reading of chapter 186, Laws of 1939, shows that the legislature intended that the statute have a prospective and not a retrospective operation. The well-settled rule, which needs no citation of sustaining authority, is that a statute will be given a prospective interpretation unless by its terms it is expressly declared to be retroactive.

Respondent is not, either under chapter 186, Laws of 1939, or—conceding *arguendo* that the act was revived —chapter 116, Laws of 1937, a distributor of fuel oil with respect to fuel oil acquired or imported subsequent to May 1, 1939, or with respect to fuel oil on hand and in storage May 1, 1939.

We note on page 23 of appellant's reply brief that counsel for appellant concedes, in view of *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, and *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, that Tidewater Associated Oil Company is not a distributor with respect to fuel oil sold by it to respondent. This obviates the necessity of discussing the question of liability of defendant, under chapter 186, Laws of 1939, for any tax on that oil.

The judgment is affirmed.

STEINERT, SIMPSON, BEALS, GERAGHTY, ROBINSON, and JEFFERS, JJ., concur.

BLAKE, C. J. (dissenting)—In registering dissent in this case, I assume the constitutionality of chapter 186, Laws of 1939, p. 581, for the reasons stated in the dissenting opinion in case No. 27852. That respondent is a "distributor" in contemplation of the act, seems to me to be too clear for argument. The term is defined in § 2(a), p. 581, as follows:

" 'Distributor' shall mean and include every person, firm, association or corporation who refines, manufactures or compounds liquid or liquefiable petroleum products, and withdraws, sells, distributes, or in any manner uses the same in this state; *also any person, firm, association or corporation who acquires the same within the state from any person refining it within or importing it into the state on which the tax of one-quarter (¼) cent per gallon has not been paid; or any person, firm, association or corporation who imports the same into this state and withdraws, sells, distributes or in any manner uses the same in this state.*" (Italics mine.)

Obviously, by this broad definition, the legislature intended to prevent the escape from a tax of ¼ cent per gallon of any fuel oil sold or *used* in this state—whether

it was imported by the user or another. That the exaction sought to be levied against respondent is neither a tax on imports nor an unconstitutional burden on interstate commerce, is firmly established by numerous decisions of th supreme court of the United States. *Nashville, C. & St. L. R. v. Wallace,* 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191; *Wiloil Corp. v. Pennsylvania,* 294 U. S. 169, 79 L. Ed. 838, 55 S. Ct. 358; *McGoldrick v. Berwind-White Coal Mining Co.,* — U. S. —, 60 S. Ct. 388; *McGoldrick v. Compagnie Generale Transatlantique,* — U. S. —, 60 S. Ct. 670.

In the case first cited, the court had under consideration a statute which, for all intents and purposes, is indistinguishable from ours. Sustaining the validity of the statute, the court said:

"Chapter 58, Tennessee Public Acts, 1923, as amended by Chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline . . .' within the state at the rate of 2¢ per gallon on the gasoline sold or stored, the tax 'to be used solely in the construction and maintenance of a highway system in the state.' But § 3 provides: 'The tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors storing any of the products mentioned in this Act and distributing the same or allowing the same to be withdrawn from storage whether such withdrawal be for sale or other use. . . . ' Storage of the gasoline and withdrawal of it from storage within the state for use or sale, are, as the state Supreme Court has held, the events which, by the very terms of the statute, call it into operation. . . .

"The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points or origin to points outside the state of Tennessee; and on the ground that it is in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier,

and is thus an unconstitutional burden on interstate commerce.

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. *General Oil Co. v. Crain*, 209 U. S. 211; *Bacon v. Illinois*, 227 U. S. 504; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 669; *Hart Refineries v. Harmon*, 278, U. S. 499; *Gregg Dyeing Co. v. Query*, 286 U. S. 472. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. . . . The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation. . . .

"It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes. . . . Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations."

MAIN, J., concurs with BLAKE, C. J.

In the Supreme Court of the United States

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OCTOBER TERM, 1940

No. 483

STATE OF WASHINGTON,
Petitioner (Appellant below),

vs.

INLAND EMPIRE REFINERIES, INC, a corporation,
Respondent (Respondent below).

MONTANA HEADLIGHT OIL COMPANY, a corporation, and GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondents
(Intervenors and Respondents below).

BRIEF OF RESPONDENTS INLAND EMPIRE REFINERIES, INC., AND GREAT NORTHERN RAILWAY COMPANY

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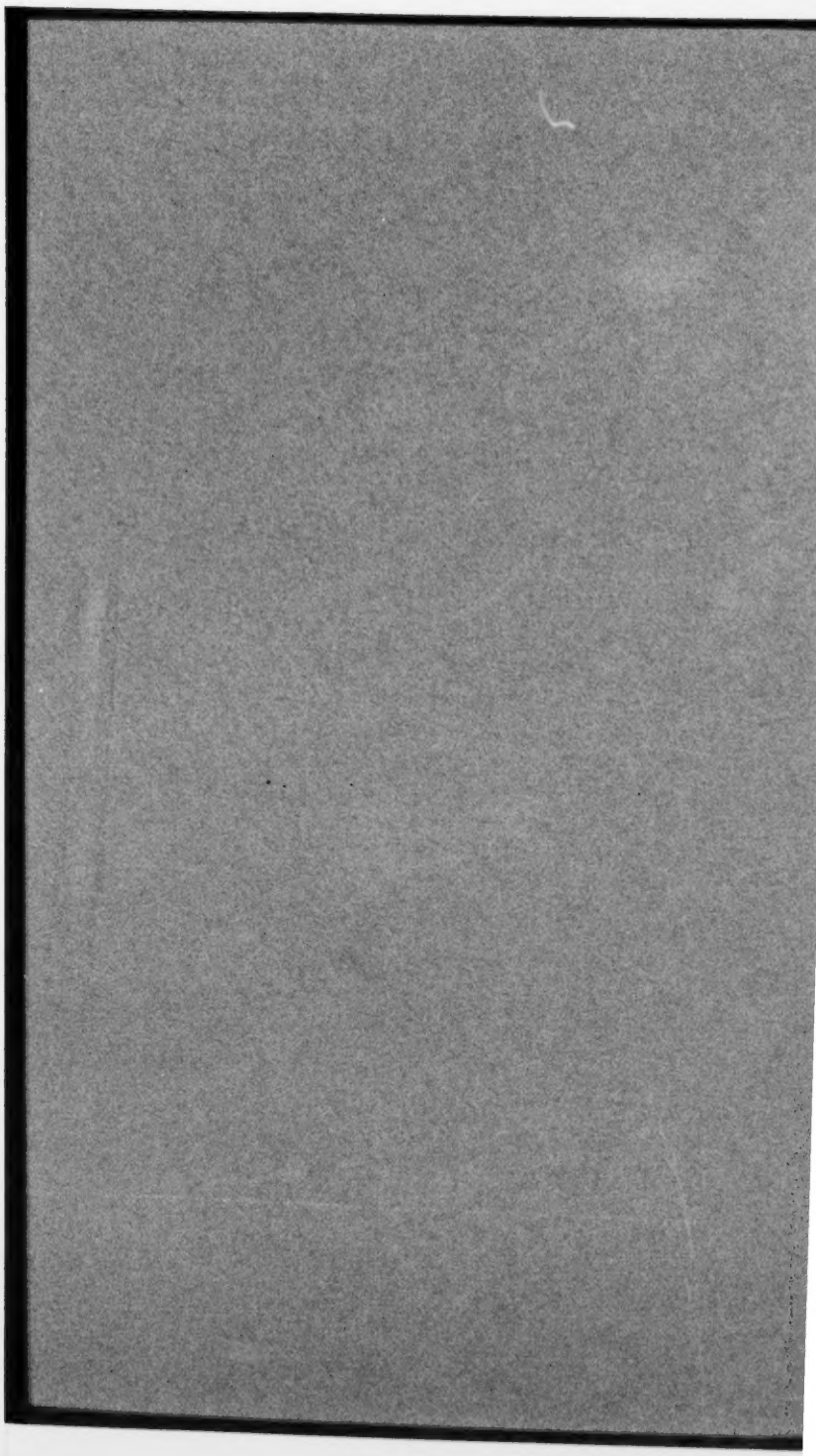

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In the Supreme Court of the United States

OCTOBER TERM, 1940

STATE OF WASHINGTON, *Petitioner* (Appellant below), vs. INLAND EMPIRE REFINERIES, INC, a corporation, *Respondent* (Respondent below). MONTANA HEADLIGHT OIL COMPANY, a corporation, and GREAT NORTHERN RAILWAY COMPANY, a corporation, *Respondents* (Intervenors and Respondents below).	No. 483

BRIEF OF RESPONDENTS INLAND EMPIRE REFINERIES, INC., AND GREAT NORTHERN RAILWAY COMPANY

STATEMENT

This proceeding is unique in that petitioner, who seeks to have this court take jurisdiction upon the ground that Chapter 186 Laws of Washington 1939 was held by the court below to be in violation of the Federal constitution, was the first one to attack the constitutionality of that statute on the ground it violates not only the fourteenth amendment to the constution of the United States but also Article I Section 12 of the constitution of the State of Washington. Not only did petitioner attack the statute on both of these state and federal constitutional grounds in the complaint filed in this case shortly after the statute became effective (see opinion of lower court (R. 63)

reported in 3 Wn. (2d) 651, 101 P. (2d) 975), but on March 22, 1939, several weeks prior to the time the statute became effective, petitioner filed mandamus proceedings to try out this question. These proceedings were held to be premature. *State ex rel. Hamilton v. Cohn*, 1 Wn. (2d) 54, 95 P. (2d) 38.

In both proceedings—the case at bar and the mandamus action found to be premature—petitioner sought to have the state court strike Section 15(e) and enforce all of Chapter 186 Laws of Washington 1939, except said section upon the ground that Chapter 186 with Section 15(e) as a part thereof was in violation of both the state and federal constitutions.

The court below refused to strike said section, holding that the state constitution did not give it that authority, and then held Chapter 186 with Section 15(e) as a part thereof is in violation of both the state and federal constitutions as contended by petitioner (R. 63). This case is unique because it seems to be the first time that a petitioner has had the temerity to ask this court to review a case decided in the court below on state constitutional grounds that were raised by the petitioner.

The position taken by petitioner throughout this litigation is shown in the following quotation from the opinion of the Supreme Court of the State of Washington in this case. In the second paragraph of the opinion the court said:

> "The purpose of the action is to test the validity of the exemption embodied in subdivision (e) Section 15, Chapter 186, Laws 1939. * * * It is the State's position that that subdivision is in-

valid and must be discarded, with the result that distributors of locally refined fuel oil would become subject to the tax." (R. 63)

Further in the opinion the court said:

"The attorney general concurs in the view that subsection (e), *supra*, is unconstitutional, as disclosed by the following on page nineteen of appellant's brief:

" 'So far as this case is concerned, sub-section (e) of section 15 of the act, undertaking to exempt from the excise tax "distributors" of products derived from refining within the state of crude petroleum or crude oil, in our opinion, discriminates in favor of Washington refineries and against distributors dealing in petroleum products refined in other states, imported into this state and here sold and such discrimination is violative of the equal protection clause of the 14th amendment to the constitution of the United States *and section 12 of Article I of the constitution of the state of Washington.*' " (Italics ours) (R. 69)

Petitioner's attempt to persuade this court to take jurisdiction makes it essential to notice at the outset that throughout this litigation petitioner has both conceded and contended that Section 15(e) of Chapter 186 Laws of Washington 1939 is invalid under Article I Section 12 of the constitution of the State of Washington, as well as under the 14th amendment to the federal constitution. Respondent Railway Company has at all times agreed with petitioner that Section 15(e) is invalid under both the state and the federal constitutions. It has contended, however, that the invalidity of that section renders all of Chapter 186

Laws 1939 unconstitutional and void and that the admitted invalid exemption can not be stricken and the remainder of the act enforced. The Railway Company was by order of the court permitted to file a complaint in intervention (R. 9) and thereafter an amended complaint in intervention (R. 187). The Railway Company's intervention was ordered because of a certain contract it has with the respondent Inland Empire Refineries, Inc., under which the Refinery supplies the Railway Company with a portion of its fuel oil. This contract by its terms requires the Railway Company to pay the Refinery, in addition to the stated price per barrel, any tax lawfully found due (R. 63, 75). In its amended complaint in intervention the Railway Company alleged that the clear and unquestioned invalidity of Section 15(e) under both the federal (14th Amendment) and the state (Section 12 Article I) constitutions rendered Chapter 186 void *in toto* (R. 200-201). In the same complaint the Railway Company alleged other and addditional grounds, based on both the state and the federal constitutions, for holding Chapter 186 Laws of Washington 1939 void in its entirety (R. 195-205).

The Superior Court of the State of Washington upheld all of the contentions of the Railway Company, and after making full and complete findings of fact (R. 21) and conclusions of law (R. 48) entered judgment holding Chapter 186 Laws of Washington 1939 unconstitutional and void (R. 55). The petitioner thereafter took an appeal to the Supreme Court of the State of Washington.

On April 26, 1940, that court, seven judges assent-

ing and two judges dissenting, affirmed the judgment entered by the trial court. The opinion of the court holding Chapter 186 Laws 1939 unconstitutional and void is primarily bottomed upon the state constitution (Article I section 12) and upon the rule than an invalid exemption provision contained in a state law cannot be stricken and the remainder enforced, when the effect is to broaden the scope of the act and thereby include as taxable persons the legislature has said were not to be taxed (R. 63).

As the petitioner at all times, both in the trial and appellate courts, alleged and argued that the exemption granted by Section 15(e) was unconstitutional and void under both the state and federal constitutions, it was obvious that the Supreme Court of the State of Washington would invalidate that section. It supported its holding on this point with a series of its own decisions construing Article I section 12 of the state constitution, with decisions of this court construing the 14th amendment to the federal constitution and with the Attorney General's own language, which has been quoted (R. 68-69). The fact should not be overlooked that the dissenting opinion of Blake, C. J. also recognized the obvious invalidity of Section 15(e) (R. 75).

The court then held that notwithstanding the presence in the act of a severability clause (section 21), section 15(e) could not be stricken and the remainder of the act enforced.

Adhering to its own prior decisions and also decisions of this court, it said:

"When Chapter 186, Laws 1939, was passed

> by the legislature and signed by the Governor, a tax was imposed by that statute upon every distributor of petroleum products, except those exempted by Section 15. It would be contrary to the expressed intent of the legislature for us to sustain the act, after striking down Section 15, subdivisions (d), (e) and (f), and impose upon the persons included within those exemption clauses the distributors who the legislature said were not to be taxed." (R. 71)

The opinion of the state court holding Chapter 186 unconstitutional and void was also based on the following state and federal grounds:

I. Chapter 186 Laws 1939 violates the requirement laid down by both the federal (14th amendment) and *the state* (*Article I Section 12*) *constitutions* that there must exist a reasonable ground for classifying those taxed and those left untaxed.

(a) Because it imposes a tax of 11% on distributors of fuel oil and leaves untaxed distributors of competing forms of fuel, such as coal, wood, sawdust and coke.

(b) Because users of all kinds of fuel must pay the 2% compensating tax, but only users of fuel oil pay in addition the 11% tax imposed by Chapter 186.

With respect to these questions, the Supreme Court of the State of Washington said:

> "True, the legislature has broad powers respecting the classification of property for excise tax purposes, yet the foregoing provisions of the federal (14th amendment) and *state constitutions* (*Article I Section 12*) *forbid an arbitrary* classification. The legislature may constitution-

ally classify persons with reference to their business, occupation or inheritance, with a view of exaction from them of excise or privilege taxes differing in amount, or differing in that one class shall be taxed and another class shall be exempted, so long as there may be some reasonable basis for such classification and so long as all in each class shall be taxed or exempted alike. * * *

"Chapter 186 Laws of 1939 violates the requirement that reasonable ground must exist for making a distinction between those who fall within the class and those who do not. No reasonable ground exists for making a distinction between those who fall within the classification of distributors of fuel oil subject to tax and distributors of fuel not subject to tax. That is, a distributor of fuel oil is required to pay a tax of approximately eleven per cent for the privilege of distributing fuel oil while there is no comparable tax upon distributors of coal, wood, sawdust, coke, gas and electricity. * * *

"To impose the compensating tax upon all persons in this state for the privilege of using tangible personal property in the state and then to single out a particular group (users of fuel oil) and impose an additional tax upon them for the same privilege is indefensible on constitutional grounds. It is violative of the rule that reasonable ground must exist for making a distinction between those who fall within, and those excluded from the classification for tax purposes. *It is, we repeat, in defiance of the purposes of the privileges and immunities clause of the state constitution* and contravenes the equal protection provision of the federal constitution." (Italics ours) (R. 65, 66, 67)

2. Chapter 186 Laws 1939 is unconstitutional because the exemption created by section 15(d) is invalid as discriminatory under both the federal (14th amendment) and the state (Article I Section 12) constitutions (R. 67). This exemption is also invalid as an attempt by the state to regulate interstate commerce (R. 68). Section 15(d) cannot be stricken from the act and the remainder enforced (R. 71-74).

3. Chapter 186 Laws 1939 is unconstitutional because of the exemption created by Section 15(f). "The classification is so obviously glaringly arbitrary, capricious and unreasonable that it seems hardly necessary to do more than invoke the equal protection clause of the federal constitution *and the privileges and immunities clause of our state constitution* to strike down this extension of special privilege to one public utility and denial to other public utilities of a like privilege of exemption" (R. 69) (Italics ours). Section 15(f) cannot be stricken from the act and the remainder enforced (R. 71-74).

4. Chapter 186 Laws 1939, by the conditions it imposes, constitutes an unlawful burden upon interstate commerce, and hence is unconstitutional under the federal constitution (R. 70-71).

Petitioner once in its petition (page 7) and once in its supporting brief (page 23) says that the Supreme Court of the State of Washington "inadvertently" referred to the tax imposed by Chapter 186 as a pass-on or consumer's tax. There was no inadvertence in the court's construction of Chapter 186 as a pass-on or consumer's tax. This construction was based on a finding by the trial court (R. 36, Finding of Fact

XXI), supported by substantial evidence (R. 300, 303-304, 305-306, 307).

This, then, is a case where the validity of a state statute was challenged by the Railway Company on both state and federal constitutional grounds. All constitutional rights claimed by the Railway Company were sustained. None were denied. The entire act was held void.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Washington having held that Section 15(e), which petitioner has admitted is invalid under Article I, Section 12 of the state constitution, could not be separated from the remainder of the act, and having held that Sections 15(d) and 15(f) were also invalid under the same article and section of the state constitution, and that they likewise could not be separated from the remainder of the act, and also having held that the entire act was invalid under Article I Section 12 of the state constitution because it made an arbitrary, capricious and unreasonable classification between those taxed and those left untaxed, and such holdings being independent non-federal grounds of decision adequate to support the judgment, this court will not grant certiorari.

ARGUMENT

This court has held from earliest times that if a decision of the state court is based upon several grounds, one or more of which is an independent non-federal ground adequate to sustain its judgment, that

judgment cannot be reviewed by this court unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or as a mere device to prevent the review of the decision upon federal questions.

McCoy v. Shaw, 277 U. S. 302, 303; 72 L. ed. 891, 892;

Enterprise Irrigation Co. v. Farmers Mutual Canal Co., 243 U. S. 157, 164; 61 L. ed. 644, 648;

Fox Film Corporation v. Muller, 296 U. S. 207, 210; 80 L. ed. 158, 159;

Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U. S. 537, 540; 74 L. ed. 1023, 1030;

Petrie v. Nampa and Meridian Irrigation District, 248 U. S. 154, 157; 63 L. ed. 178, 179;

Kalb v. Feuerstein, 84 L. ed. (Adv. Opinion) p. 281 at 283;

Henderson Bridge Co. v. City of Henderson, 141 U. S. 679; 35 L. ed. 900, 904;

Elkins v. Land Title Bank & Trust Co., 302 U. S. 638; 82 L. ed. 496;

Klinger v. Missouri, 13 Wall. 257; 20 L. ed. 635, 637;

Utley v. City of St. Petersburg, 292 U. S. 106, 111; 78 L. ed. 1155, 1159;

Pacific Telephone & Telegraph Co. v. Henneford, 306 U. S. 637; 83 L. ed. 1038; 195 Wash. 553.

In *McCoy v. Shaw, supra,* 277 U. S. 302, 303; 72 L. ed. 891, 892, the court said:

> "It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question."

Again, in *Enterprise Irrigation Co. v. Farmers Mutual Canal Co., supra,* 243 U. S. 157, 164; 61 L. ed. 644, 648, the court said:

> "Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. * * * Where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions."

In the late case of *Broad River Power Co. v. South Carolina ex rel. Daniel, supra,* 281 U. S. 537, 540; 74 L. ed. 1023, 1030, the court stated the rule as follows:

> "but if there is no evasion of the constitutional issue * * * and the non-federal ground of decision has fair support * * * this court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own

view of what should be deemed the better rule for that of the state court."

In dismissing for want of jurisdiction the writ of certiorari filed in the case of *Fox Film Corporation v. Muller, supra,* 296 U. S. 207, 210; 80 L. ed. 158, 159, this court said:

> "The case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our decision fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed, at least as early as *Klinger v. Missouri,* 13 Wall. 257, 263; 20 L. ed. 635, 637, and has been reiterated in a long line of cases since that time."

Mr. Justice Black, in *Kalb v. Feuerstein, supra,* 84 L. ed. Adv. Opinion, p. 281, 283, stated the rule in the following way:

> "Appellees insist, however, that the Wisconsin court on rehearing rested its judgment on an adequate non-federal ground. If that were the fact, we would not under accepted practice, reach the state court's construction of the federal statute."

One of the most recent decisions on the question is *Pacific Telephone & Telegraph Co. v. Henneford, supra,* 306 U. S. 637; 83 L. ed. 1038; 195 Wash. 553, a case going up from the State of Washington. On February 6, 1939, this court denied, without opinion, a petition for writ of certiorari by the Tax Commission of the State of Washington to review a decision of the Supreme Court of the State of Washington holding a state statute imposing an excise tax desig-

nated as a "compensating tax" unconstitutional. In that case the state court, as it has in the case at bar, based its opinion holding that the Telephone Company was not subject to tax, upon both state and federal grounds: (1) that the statute was not intended to impose a tax upon merchandise purchased outside the state, which could not be purchased within the state, the purpose of the tax being to protect local merchants against out of state competition, and (2) the tax imposed by the statute amounted to an unlawful burden upon interstate commerce. This court's refusal to review the state court's decision was apparently based upon the existence of an adequate non-federal ground relied upon by the state court, even though it also rested its decision upon a federal ground.

The case at bar comes squarely within the rule of the foregoing cases. Each non-federal ground of the decision is adequate to support the judgment. The petitioner at all times contended in the state court that Section 15(e) was unconstitutional under both the state and federal constitutions (R. 2, 18, 19, 69). Petitioner does not in this court contend that Section 15(e) is valid. It admits the contrary (p. 29 Petitioner's Brief). The State Supreme Court held on undisputed authority that the exemption from tax extended to local refiners by Section 15(e) was invalid under the state constitution (R. 71-74).

The state court also held on the authority of its own prior decisions that the exemption from tax extended to foreign vessels by Section 15(d) and the exemption extended to gas companies by Section 15(f) were invalid under the state constitution (R. 67, 68, 69).

A decision by the Supreme Court of the state that the state statute is repugnant to the state constituion is conclusive upon this court and does not present any question for review.

This rule is supported by a long line of cases, a few of which are:

Neblett v. Carpenter, 305 U. S. 297, 302; 83 L. ed. 182, 187;

Utley v. St. Petersburg, 292 U. S. 106, 110; 78 L. ed. 1155, 1158;

Atchison, Topeka & Santa Fe Ry. v. Railroad Commission, 283 U. S. 380, 390; 75 L. ed. 1128, 1136;

Fort Smith Lbr. Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 534; 64 L. ed. 396, 399;

Montana ex rel. Haire v. Rice, 204 U. S. 291, 301; 51 L. ed. 490, 495;

Merchants' & Manufacturers' National Bank v. Pennsylvania, 167 U. S. 461, 462; 42 L. ed. 236, 237;

Salomon v. Graham, 15 Wall. 208, 210; 21 L. ed. 37, 39;

Carstairs v. Cochran, 193 U. S. 10; 48 L. ed. 596, 597.

In the case of *Atchison, Topeka & Santa Fe Ry. v. Railroad Commission, supra*, 283 U. S. 380, 390; 75 L. ed. 1128, 1136, the rule is stated thus:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

This exact question was before the court in *Montana ex rel. Haire v. Rice, supra*, 204 U. S. 291, 301;

51 L. ed. 490, 495, in which the state court had also held a state statute unconstitutional and the court refused to review that decision, saying:

> "It is further claimed by the plaintiff in error that the Supreme Court of the state erred in holding that the law under which the bonds were issued and the proceeds of the public lands devoted to their payment was repugnant to the constitution of the state. Upon this question the decision of that court is conclusive, and plainly we have no power to review."

As said in *Utley v. St. Petersburg, supra*, 292 U. S. 106, 110; 78 L. ed. 1155, 1158:

> "We do not elaborate the argument, for the conflict, if there is any, between the statute regulating this improvement and the local constitution, must be judged, not by us, but by the courts of the locality."

A decision by the Supreme Court of the state that an invalid section is inseverable is conclusive upon this court.

"It would be contrary to the expressed intent of the legislature for us to sustain the act after striking down sections 15(d), (e) and (f) and impose upon the persons included within those exemption clauses the distributors whom the legislature said were not to be taxed" said the Supreme Court of the State of Washington, basing its decision upon its own prior controlling decision in *Jensen v. Henneford*, 105 Wash. 209; 53 P. (2d) 607, and upon the leading case of *Hill v. Wallace*, 259 U. S. 44; 66 L. ed. 822 (R. 71).

That such a decision is conclusive upon this court

is established by the case of *Dorchy v. Kansas*, 264 U. S. 286, 290; 68 L. ed. 686, 690, wherein it was said:

> "The task of determining the function of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this court."

To the same effect:

Fox Film Corporation v. Muller, 296 U. S. 207, 210; 80 L. ed. 158, 160;

Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 562; 69 L. ed. 785, 788;

Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 397; 67 L. ed. 715, 718;

Schneider Granite Co. v. Gast Realty & Inv. Co., 245 U. S. 288, 290; 62 L. ed. 292, 295;

Guinn v. United States, 238 U. S. 347, 366; 59 L. ed. 1340, 1348;

King v. West Virginia, 216 U. S. 92, 101; 54 L. ed. 396, 401;

Gatewood v. North Carolina, 203 U. S. 531, 541; 51 L. ed. 305, 309, 310;

Olsen v. Smith, 195 U. S. 332, 342; 49 L. ed. 224, 229.

The state court also based its decision on other non-federal grounds. The non-federal grounds being adequate to support the judgment of the state court, the existence of a federal question is not ground for granting a writ of review.

In addition to the foregoing independent non-federal grounds, any one of which is adequate to sustain the judgment of the state court, the Supreme Court of the State of Washington held Chapter 186 was void under the privileges and immunities clause of the state constitution (Article I Section 12) because it taxed distributors of fuel oil while leaving untaxed distributors of competing forms of fuel, such as coal, wood, sawdust and coke, and because distributors of fuel oil were made subject not only to the tax imposed by Chapter 186, but also to the compensating tax, making a total tax of 13% on distributors of fuel oil, whereas distributors of competing forms of fuel were subject only to the 2% compensating tax (R. 66, 67). This holding was based on a line of decisions by the state court construing Article I Section 12 of the constitution of the State of Washington. These cases which are cited in the opinion by the state court (R. 65, 67, 68) hold that, under Article I Section 12 of the state constitution, a statute must have a reasonable basis for classification for tax purposes, that all in each class must be taxed or exempted alike, and that there can be no arbitrary, capricious or unreasonable classification.

Under the authorities heretofore cited, this is also an independent non-federal ground adequate to support the judgment.

The Railway Company in the courts below, in addition to the non-federal grounds set forth above, urged additional reasons based on the federal constitution for the invalidity of Chapter 186 (R. 200-205). So, also, did petitioner urge that Section 15(e) was invalid under the 14th Amendment to the federal constitution (R. 218, 219). The State Supreme Court adopted as further reasons for holding Chapter 186 unconstitutional the federal grounds urged by the Railway Company and the petitioner. The line of demarcation between the non-federal and the federal grounds is made explicit by the opinion of the state supreme court. The vigor and strength of the non-federal grounds to support the judgment is not diminished one particle by the presence in the opinion of the additional federal grounds. Under these circumstances the existence of the additional federal questions has no significance. *Bilby v. Stewart*, 246 U. S. 255, 257; 62 L. ed. 701, 703.

There being no basis for contending the non-federal ground of decision was unfounded, arbitrary or a mere device to prevent review, this court will deny the petition for writ of certiorari.

In the cases cited by petitioner the federal protection invoked was denied or evaded on a non-federal ground. In the case at bar the situation is just the reverse. The petitioner sought no federal right that was denied. All federal rights invoked, aside from petitioner's contention that Section 15(e) was invalid under the 14th Amendment to the federal constitution, were invoked by the Railway Company. This is clearly shown in petitioner's recitation of the manner in which

federal questions were raised, appearing on pages 13 to 15 of its petition. All questions raised, both those arising under the federal constitution and those arising under the state constitution, were passed upon and sustained. None was evaded. All were decided adversely to the petitioner, except that the one federal question raised by petitioner—the invalidity of Section 15(e)—was decided in accordance with petitioner's contentions. Where the judgment is placed upon two grounds, one federal and the other not, this court tests its jurisdiction by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. A reading of the opinion by the Supreme Court of the State of Washington in this case is enough to show the judgment does not rest alone upon the decision of a federal question.

CONCLUSION

That part of petitioner's brief which is not devoted to a discussion of the merits contains an argument based not on Chapter 186 as construed by the state's highest court, but on Chapter 186 as petitioner would like it construed. Petitioner would ask this court to take Chapter 186 and reconstrue it. It is an axiom that this court will take the state statute precisely as interpreted by the state court and follow the state construction.

Minnesota ex rel. Pearson v. Probate Court of Ramsey Co., 84 L. ed. (Adv. Opinions) 477, 479;

Knights of Pythias v. Meyer, 265 U. S. 30, 33; 68 L. ed. 885, 888;

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 513; 77 L. ed. 463, 465;

J. Bacon & Sons v. Martin, 305 U. S. 380, 381; 83 L. ed. 233, 235;

Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 41; 70 L. ed. 818, 821;

Keith v. Johnson, 271 U. S. 1, 8; 70 L. ed. 795, 799;

American Railway Express Co. v. Royster Guano Co., 273 U. S. 274, 280; 71 L. ed. 642, 643;

Dorchy v. Kansas, 272 U. S. 306, 308; 71 L. ed. 248, 266;

Roe v. Kansas ex rel. Smith, 278 U. S. 191, 193; 73 L. ed. 259, 261;

Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 139; 73 L. ed. 637, 641;

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 362; 77 L. ed. 360, 365.

The rule is stated in *Minnesota ex rel. Pearson v. Probate Court of Ramsey Co., supra*, 84 L. ed. (Adv. Opinions) 477, 479:

> "This construction is binding upon us. Any contention that the construction is contrary to the terms of the act is unavailing here. For the purpose of deciding the constitutional questions appellant raises, we must take the statute as though it read precisely as the highest court of the state has interpreted it,"

and in *Knights of Pythias v. Meyer, supra*, 265 U. S. 30, 33; 68 L. ed. 885, 888:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become

> axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein, * * * and we must follow the state construction even though it may not agree with our own opinion."

If the petition had set forth the theory followed by petitioner throughout this litigation it would have appeared frivolous on its face. The petitioner having at all times conceded that Chapter 186 was partially invalid under the state constitution, and the state court having held such partial invalidity rendered the entire act invalid—a holding conclusive upon this court—for this and the other reasons assigned in this brief, the writ should be denied.

Respectfully submitted,

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